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CHARLES ELMORE

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA,

*Plaintiff*

*v.*

STATE OF TEXAS,

*Defendant*

**BRIEF FOR THE STATE OF TEXAS IN OPPOSITION TO  
MOTION FOR JUDGMENT**

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In any event, Texas should not be prohibited from exercising its legislative power to "preserve and regulate the exploitation of an important resource" within its borders, in the absence of conflicting national legislation. See *Toohey v. Witsell*, 334 U.S. 385 (1948)

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# Supreme Court of the United States

OCTOBER TERM, 1949

No. 13, Original

UNITED STATES OF AMERICA,

*Plaintiff*

*v.*

STATE OF TEXAS,

*Defendant*

## BRIEF FOR THE STATE OF TEXAS IN OPPOSITION TO MOTION FOR JUDGMENT

### QUESTIONS PRESENTED

1. Whether, in the exercise of its original jurisdiction and on a good faith showing by the State of Texas of a genuine controversy as to facts which will aid the Court in arriving at its final determination of the ultimate issues of both fact and law, this Court should sustain plaintiff's motion for summary judgment on the pleadings and thereby foreclose the defendant State from offering its evidence at trial on the merits.

2. Whether, under the circumstances stated in Question 1, the United States is now entitled as a matter of law to an adjudication that it is the owner and has the exclusive right to take and enjoy the complete benefit and economic use (as distinguished from its undisputed paramount government powers of regulation, control, defense, etc.) of the lands, minerals and other resources underlying the Gulf of Mexico within the boundaries of Texas.

## STATEMENT

The development of the suit before the Court, involving rights to the lands, minerals, and other things underlying the Gulf of Mexico within the boundaries of the State of Texas, is set forth in plaintiff's statement of the case. On the basis of the pleadings, the ultimate issue on the merits is whether the United States has, as against Texas, the ownership and exclusive economic use and right to take and enjoy the complete benefit of the lands, minerals, and other resources lying beneath the Gulf of Mexico within the boundaries of Texas.

Sitting as a court of original jurisdiction in the case at bar, this Court is the trier of both the facts and the law. The present hearing before the Court is not, however, a trial on the merits. The issue here is narrow. The Court has before it only a complaint, an answer, plaintiff's motion for judgment, and briefs directed thereto. There is no record. The plaintiff has not submitted its case for final adjudication. By its motion for judgment, plaintiff asks only an adjudication in its favor and, if this is denied, it reserves to itself "the right to trial on any issues of fact which can not be resolved by judicial notice." Since on the plaintiff's motion for judgment on the pleadings all issues properly raised by the pleadings are resolved against the moving party, the questions presented relate (1) to the justice of sustaining plaintiff's motion for judgment in a case of this magnitude on the pleadings alone, and (2) to the desirability of doing so without allowing a full development of the evidence.

Defendant contends that the pleadings raise, and that in truth there are, genuine issues of material fact in dispute, and that it should be given an opportunity to develop fully its evidence at trial. Defendant has not moved for judgment, but now has pending its motions for appointment of a master and leave to take oral depositions.

In support of its opposition to plaintiff's motion for summary disposition, defendant will proceed to outline the nature of the case and the nature of its defenses, not for a determination on the merits, but merely to show in good faith the controverted issues on which it is entitled to make full development of the evidence at trial on the merits.

## NATURE OF THE CASE

### Extent of the Area in Controversy

The complaint alleges that the Federal Government "is the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark" and within the Gulfward boundaries of the State of Texas.

The described area embraces 2,608,774 acres of shallow submerged lands which have been within the statutory boundaries of Texas since the first session of the Congress of the Republic of Texas in 1836. This area extends from low-water mark

Motion for Leave to File Complaint, page 5, Par. II.  
See Texas Boundary Act, Dec. 19, 1836, 1 Laws, Republic of Texas 133, 1 Gammel's Laws of Texas, 1193. The area is described as "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande."



along the coast to a line three leagues (nine marine miles) from shore. The area is shown within the boundary lines (in red) on first map opposite this page. The depth of the waters overlying the area runs from a matter of inches at the low-water mark to an average of 42 feet at the three-league line.

In addition, the complaint includes that part of the continental shelf underlying the Gulf outside of Texas' original three-league boundary and between that boundary and the edge of the shelf. This much larger area is beneath the "high sea" as distinguished from the "marginal sea" or territorial waters which cover the first area above described. It is delineated on the map opposite this page.

The relation of the total area to the overlying waters and the mainland is shown on the cross-section map opposite this page. This map shows the vast substance of the subsoil as compared with the waters above. It also illustrates that the formations of the subsoil beneath the adjacent Gulf are the same as those beneath the uplands. They are extensions of the subsoil strata and perhaps indicate why practically all international law publicists and jurists treat the bed and subsoil of the adjacent sea as an extension of the continental land mass subject to the same laws of ownership and territorial sovereignty as the uplands. The accepted theory, at least since 1670, has been that the pearls, oysters,

<sup>3</sup> The average depth at  $\frac{1}{2}$  mile from shore is 13 feet; at 1 mile, 18 feet; at 2 miles, 26 feet; at 3 miles, 29 feet; at 6 miles, 36 feet; and at 9 miles, 42 feet. See U.S. Coast and Geodetic Maps, Texas Coast.

<sup>4</sup> This area was included within the State's boundary extension acts of 1941 and 1947. Acts 1941, 47th Leg., Ch. 286, p. 454; Acts 1947, 50th Leg., Ch. 253, p. 451.



sponge, kelp, and other sedentary marine life, and the minerals beneath the bed, can be owned, developed, used, and enjoyed so long as there is no interference with paramount public rights in the overlying waters.

The Mainland-Gulf cross-section also indicates the geologic ages during which this subsoil has been built up. For instance, practically all of the area shown on the cross-section was once covered by the waters of the sea. In the beginning of the miocene age the sea covered the area now known as Texas almost as far north as Austin (200 miles from the present coast line). The present area covered by the Gulf along the shore is being built up by alluvial deposits from the streams emptying into the sea and by the sands of the sea at the rate of several inches each year. Geologists say that much of the entire area here in controversy will some day lie wholly above the waters of the sea as a result of these forces of nature. Other portions will, of course, be filled more rapidly by artificial means, as in the past, for useful purposes.

The accepted theory of the organic origin of oil is that it was formed in the earth from the remains of marine plant and animal life buried in the sand, rock, and clay by sedimentary marine deposits during the various ages indicated on the cross-section referred to above. The resulting substance is found

See chronological chart of Opinions of Jurists and Publicists, 1670-1950, Memoranda and Appendix, p. 18.

Dr. E. H. Sellards, *Texas Through 250,000,000 Years* (1939).

Wallace E. Pratt, *Petroleum on the Continental Shelves*, 31 Bulletin of the American Association of Petroleum Geologists (1946) 657; Paul H. Price, "Evolution of Geologic Thought in Prospecting for Oil or Natural Gas," *Id.* at 673.

in the earth today beneath waters the same as beneath uplands and at approximately the same depths. Recoverable oil does not exist in migratory pools running beneath the earth's surface. It exists in the structures or traps of porous sand and rock and moves only by some extreme force of nature or when artificial forces are employed to extract the mineral substances from the rock or sands. The "ownership in place" doctrine therefore has a logical basis. It has existed in the law of Texas since Spanish Colonial days when the Mining Ordinance of New Spain, 1783, brought "semi-minerals, bitumens and juices of the earth," both discovered and undiscovered, into the direct ownership of the king while remaining beneath the surface of the soil. The property has been taxable the same as other real property in this State. This "ownership in place" doctrine in Texas was recognized by this Court in *Texas Railroad Commission v. Rowan and Nichols Oil Co.*, 310 U.S. 573 (1940). The concept is now followed in the property law of many of the States.

#### Nature of the Rights in Controversy

At issue in this case is the ownership of the sub-soil resources and minerals or the right to develop, use, or dispose of them for profit. The right is described by plaintiff as "ownership" or "paramount rights in, and full dominion and power over" the property. However, to eliminate any misunderstanding which would otherwise be caused by confusion of the proprietary substance of this controversy

with governmental powers which are not in controversy, the plaintiff has properly termed it:

✓ "or whatever is the most accurate description of the right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea." (Plaintiff's brief, p. 16.)

In describing the nature of plaintiff's claim to the Senate Committee on Interior and Insular Affairs, Solicitor General Perlman was more specific:

"Well, of course, it rests on the claim of title. If we ~~had~~ no title, we are not entitled to it."

*have*

The present case does not involve any rights to the overlying waters or the use of them. Both plaintiff and defendant recognize that neither the State nor the Federal Government, nor their grantees and lessees, may use or develop the subsoil resources in such manner as to ~~conflict or interfere with public~~ use of the waters or with the exercise of paramount governmental powers relating to defense, navigation, international relations, conservation, eminent domain, etc. To such extent, the ownership and beneficial use of the subsoil is a qualified right just as ownership of subsoil minerals under private lands is restricted by governmental rights and regulations which involve proration of production, conservation, safety, health, and eminent domain.

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\* Hearings Before the Committee on Interior and Insular Affairs on S. 155, S. 1545, S. 923, S. 1700, and S. 2153. (Reporter's Transcript, Vol. 3), 81st Cong., 1st Sess. (1949) 88.

Although governmental powers may be employed in the original acquisition of this type of property the same as other proprietary substances, the governmental power (*imperium*) and the proprietary rights (*dominium*) do not become inseparable. Practically all publicists and jurists on the subject from 1670-1950 are in agreement that sovereignty and ownership are separable in the soil here in controversy the same as in the soil of the upland territory.<sup>9</sup>

Dean Roscoe Pound has developed this point and its application to the present case in a separate memorandum "*Rights Involved in United States v. Texas*," which is attached hereto at page 1 of the Memoranda and Appendix. Reference is thereto made for full treatment.

That the rights of substance here in controversy are subject to ownership severable from the paramount governmental powers which exist over the area has been recognized by counsel for plaintiff.<sup>10</sup> It was also implicit in a statement of the Court recognizing the power of Congress over the property involved in the *California* case.<sup>11</sup>

<sup>9</sup> See Opinions of Jurists and Publicists, 1670-1950, Appendix, p. 18.

<sup>10</sup> Solicitor General Perlman, in answer to a question by Mr. Justice Reed at argument on the Motion for Leave to File the Complaint herein, said that if the United States owns the property, it could convey it to the States. His words:

"Oh, yes, Congress could give whatever title it has, whatever rights it has, to the states." Argument, *United States v. Texas*, 1949, Reporter's Transcript, p. 6.

<sup>11</sup> In holding that the Attorney General was authorized to bring the suit, the Court said that alleged Congressional recognition of State ownership by negative acts and passage of a subsequently vetoed State ownership bill were ineffectual to limit the powers of the Attorney General to safe-

As stated in the Government's brief in *United States v. California*, 332 U.S. 19 (1947), ownership of this property is not a necessary incident of sovereignty or essential to the exercise of federal constitutional powers over the area. At page 89 of the brief it was said:

"We do not argue that the effective exercise of the foregoing powers (national defense, commerce, international relations) granted to the Federal Government by the Constitution would be impossible without ownership of the marginal sea."

#### Rights Not Involved

In asserting its ownership of the subsoil and minerals in controversy, the State of Texas does not pre-

guard "government rights and property." It added, however, the following statement: "An Act passed by Congress and signed by the President could, of course, limit the power previously granted the Attorney General to prosecute claims for the Government. For Articles IV, § 3, Cl. 2 of the Constitution vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' We have said that the constitutional power of Congress in this respect is without limitation. *United States v. San Francisco*, 310 U.S. 16, 29-30. Thus neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power." (332 U.S. at 27.)

In stating that valuable improvements made in good faith under State titles are not ground for a different judgment, the Court added: "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions or persons acting pursuant to their permission. See *United States v. Texas*, 162 U.S. 1, 89, 90; *Lee Wilson & Co. v. United States*, 245 U.S. 24, 32." (332 U.S. at 40.)



tend to possess any rights which legally could be exercised or used in a manner which conflicts with or interferes with federal paramount governmental powers over the area. If this is not clear from defendant's answer, it should be made clear now. By its answer, the State intended to acknowledge all of the United States' governmental powers, (i. e., national defense, commerce, navigation, international relations, etc.) which are separable from and paramount to ownership of the subsoil and minerals.

Because of the navigable waters overlying the soil in controversy and because of the importance of those waters in interstate commerce, national defense, and international affairs, the State recognizes that its use and ownership of the subsoil is and can be further restricted and regulated when necessary for the proper exercise of those Federal functions. Because of these federal powers, the State or its lessees may be restricted from building structures in or over the waters or otherwise using them to reach the subsoil resources when such use would interfere with navigation, defense and other constitutional federal powers. There have been occasions when exclusive federal use of the waters for bombing ranges and navigation rendered use of the subsoil impossible by the State and its lessees.<sup>12</sup>

<sup>12</sup> The United States Engineers have ruled that no derricks shall be built or operations conducted within waters 2,500 feet on each side of the Galveston ship channel because of possible interference with navigation. State lessees holding leases beneath these waters must tunnel or slant drill from the shore or else they simply cannot produce the minerals below this particular area. They bought the leases knowing that they were subject to existing and subsequent federal rules and regulations for the protection of navigation. Also, on June 1, 1949, the Department of Defense held



None of these paramount governmental powers is in controversy, because defendant does not claim to possess them and does not claim that its rights in the subsoil and minerals entitle it to retard or conflict with their exercise.

In fact, the Congress as early as 1899 provided a means by which federal officials could determine in the first instance whether structures and other operations in the beds of these waters shall be permitted because of non-interference with paramount governmental powers or prohibited because of possible interference. This statute leaves the determination to the Chief of Engineers, Department of Defense, and provides that such activities shall not be carried on in the waters without his approval. This requirement has always been respected, and the approval obtained by the State and its grantees before building bridges and piers, drilling wells, conducting geophysical exploration, and filling or building upon lands nearest the shore. Evidence can be adduced at a trial on the merits to show that the State's ownership is not now being, and never has been, exercised so as to interfere with any exercise of the federal governmental powers which relate to the waters overlying the subsoil and minerals.

In this respect, there may be a difference between the issues drawn in this case and those placed in

a hearing and thereafter restricted an area of the coastal waters 30 miles long and 10 miles wide (195,748 acres) for a bombing range. The result is that the State and its lessees must keep structures out of the waters and obtain the beneficial uses of the minerals below by tunneling or slant drilling from the shore or not at all until after the bombing range restriction has been lifted.

controversy in the *California* case. The Court's reference to the State in that case indicates that California had left the impression it contended its claims were not subject to the superior governmental powers of the nation to regulate and control its activities in order to prevent conflict with national defense, navigation and commerce, or that the State itself claimed some of those powers. This Court said:

"The State is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks." (332 U.S. at 35-36.)

That is why we have explained at length that as far as Texas is concerned, it does not seek any superior governmental power or sovereignty in this area which is delegated by our Constitution to the United States. It seeks only to continue exercising the rights concomitant with the ownership of the underlying subsoil and minerals just as it has been doing under our constitutional system for the past 100 years both here and beneath other waters and unsold lands within the boundaries of Texas.

That these proprietary rights of the State can continue to be exercised without interfering with the waters above is best illustrated by the fact that the wells now producing oil from beneath the bed of the Texas marginal belt do not even touch the waters. They are slant-drilled from the shore as indicated on the cross-section of Caplen Field opposite this page. The same practice has been used in under-sea min-

Turn to Card No. 1803 for Chart Appearing  
at This Spot.

ing for more than 100 years.<sup>14</sup> An example is the famous Lota coal mine off the coast of Chile which extends four miles beneath the Pacific Ocean. Its operation began in 1852. A cross-section of this mine is pictured on the reverse side of the second map opposite page 4 of this brief.<sup>15</sup>

Of course, when structures are necessary in the waters, Texas and its lessees respect the prior determination of the Department of Defense and United States Engineers before they are built.

It should be added also that the development of these minerals by the State has been in the same good faith that it has, since annexation to the United States in 1845, continued to lease, use, and sell the shell, sand, oysters, and other products of the soil without interfering with federal powers over the area.

Instead of conflicting with national defense, the State and its lessees have aided two war efforts by developing oil from these lands. True, during peace-

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<sup>14</sup> English sea coal mines were worked as early as the reign of James I (1567-1625). Letter from British Ministry of Fuel and Power, March 3, 1950.) See: Gray, *Mining Coal Under the Sea in Nova Scotia with Notes on Comparable Undersea Coal-Mining Operations Elsewhere*, The Canadian Mining and Metallurgical Bulletin (1927) 638.

<sup>15</sup> Other such under-sea mining operations include the Dielette, France, iron ore mines opened in 1888; Whitehaven, Cumberland and Lothians, Levin, Scotland, coal mines under the Irish Sea and under the Firth of Forth, respectively; Fife, Levin, Scotland, coal mines under Firth of Forth, now operating 3,253 yards under sea from shore; Northumberland and Durham coal mines under the North Sea; Inverness and Sydney coal mines of Nova Scotia, the latter extending 3½ miles from shore; John Darling and Burwood, New South Wales, Australia, coal mines under the Pacific; and the Schwager and Lirquen coal mines under the Pacific Ocean off the coast of Chile.

time the revenues, all of which are dedicated to the Texas Public School Fund, are considered the most important aspect of the lands to the State. However, during and since World War II, the finding and development of these oil reserves by State lessees have been most important to our nation.

• Secretary of Defense Forrestal testified in 1948:

“It is the view of the national military establishment that development of the tidelands areas should proceed as rapidly as possible and that all necessary action should be taken to permit rapid development of those areas. Delays in the development of the oil potential in the tidelands is considered contrary to the best interests of the United States from the viewpoint of national security. . . . I do wish to emphasize that undeveloped oil fields provide no power for the machines of either war or peace.”

The House and Senate Judiciary Committee Reports in 1948 concurred in this language:

“The theory of establishing Government oil reserves by setting aside undeveloped areas has been discarded by practically all competent per-

Joint Hearings Before the Committees on the Judiciary on S. 1988 and Similar House Bills, 80th Cong., 2d Sess. (1948) 607. The importance of the continuance of these operations is indicated by the fact that plaintiff has not sued any of the lessees who are developing and producing oil from the property either in Texas or in the California marginal belt. They are being allowed to continue their operations, and executive officials have recommended to Congress that Federal leases be given to those who held State leases prior to the California decision. The conflict in this case is not with private interests but with the State, which is carrying the entire burden, financial and otherwise, of this litigation.



sons who have studied the matter. The national military establishment is now in process of returning to the Interior Department for leasing to private interests under existing laws all Naval reserves areas except two which are developed or in the process of development."

Congress has never attempted to enter the field and there is not now any legislation, even with respect to the California marginal belt, under which Federal officials can lease or develop the minerals.<sup>17</sup>

Except for the foresight of the State and its lessees, this oil would not now be developed. Under Texas conservation laws, it is not hurriedly drained and disposed of. Oil wells are required to produce slowly in accordance with established rates of maximum total recovery. They average less than 100 barrels per day and average a producing life of 25 years. A well tapping the producing horizon this year means readily available oil for future emergencies in the years ahead.<sup>18</sup>

Development under both State and Federal leases is conducted by private lessees just as the govern-

<sup>17</sup> Opinion M-344985, August 8, 1947, from the Solicitor of the Department of the Interior to the Secretary of the Interior; Letter opinion from Attorney General Tom C. Clark to the Secretary of the Interior, August 29, 1947.

<sup>18</sup> Testifying concerning the ability of the industry to make available oil needed in times of peace and war under the present policy of State control, former Secretary of Interior Krug said:

"They have done a miraculous job. I think they will continue doing a miraculous job, whether or not the United States gives up its ownership of these lands to the States." Report No. 1778, House of Representatives, 80th Cong., 2d Sess. (1948), by the Committee on the Judiciary on H. R. 5992.



ment has proposed for future leases on the California marginal belt.<sup>19</sup> The only difference is that the State of Texas, under a sealed-bid system, receives far more per acre from the lessees than the federal government receives under the Federal Mineral Leasing Act. 61 Stat. 914 (1947).<sup>20</sup>

In summary, Texas does not claim that its ownership of the subsoil and minerals entitles it to interfere with or retard any federal powers of regulation, control, defense; or diplomacy. Governmental powers are not involved in this lawsuit. Neither can plaintiff assert that national defense and the public interest is not being served by Texas' management and development of its properties.

## SUMMARY OF ARGUMENT

### I.

This case is not controlled by *United States v. California*, 332 U.S. 19. The State of California had no interest in its marginal belt other than that which it acquired from the United States. Texas, on the other

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<sup>19</sup> S. 923 and H. R. 341, 81st Cong., 1st Sess. (1949).

<sup>20</sup> Texas averages nearly \$20 per acre on its undeveloped submerged lands as compared with 25¢ per acre paid by the first applicant on Federal leases with similar terms. State rentals and royalties are also higher. Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, 1297. If the 350,000 acres of tideland leases sold by Texas prior to this suit for \$7,000,000 had been let under the Federal Mineral Leasing Act, they would have cost the oil companies only \$87,500. This makes it understandable why the pending applicants for Federal leases covering the same lands oppose continued ownership and operations by the State.

hand, as an independent nation, acquired full rights of sovereignty and ownership of the lands and minerals in the marginal belt within its borders and maintained its rights thereto for ten years prior to annexation to the United States. The United States has no interest in these lands and minerals except what it acquired from the Republic of Texas. Therefore, the United States in this case is in the same position as was occupied by California in the *California* case in so far as proprietary rights are concerned. The present case is necessarily governed by different issues of fact and law. In fact, plaintiff contends only that the *California* case is applicable here unless Texas "can show special reason for different treatment." Texas, being the original sovereign and proprietor over these lands and minerals, and not having ceded them to the United States, presents an entirely different case which requires entirely different treatment.

Unlike the situation presented in the *California* case where the basic facts were not in dispute and where neither party suggested any necessity for the introduction of evidence, the plaintiff has here raised issues of disputed fact, especially as to the intention of the parties to the Annexation Agreement, the determination of which are essential to disposition of the case on the merits. The distinct character of the issues presented, none of which were considered or passed upon in the *California* case, wholly differentiates the two cases. The differences are more fully summarized in the memorandum by Dr. Charles Cheney Hyde at page 12 of the Memoranda and Appendix in this brief.

II.

Plaintiff is not now entitled to judgment disposing of this case on the pleadings, and the motion for judgment should be denied. While the case on the merits is one of great magnitude and importance, the issue now before the Court is extremely narrow. This issue is whether a judgment on the pleadings should be rendered in favor of the United States without according the State of Texas the opportunity it has requested to develop fully its evidence at trial. The case is not ripe for adjudication. There is no record. The plaintiff has not submitted its case for final adjudication. It asks only an adjudication in its favor and, if this is denied, it reserves to itself the right to trial.

Following accepted modern principles of pleading, the complaint and answer contain broad allegations that develop only the ultimate issues, and these embrace mixed conclusions of law and fact. In effect the complaint alleges that the plaintiff is the owner of the lands, minerals, and other things in question and the answer controverts this. It is not disputed that the United States has paramount governmental powers over the area in question.

Plaintiff's motion should be overruled for the following reasons:

A. The pleadings having properly raised an ultimate issue of ownership or "whatever is the most accurate description of the right to take and enjoy the complete benefit of the mineral and other resources" (Plaintiff's brief, p. 16), questions of fact or mixed questions of law and fact are immediately apparent. We have found no reported case involving

a title or ownership claim which was disposed of on motion for judgment on the pleadings except when the parties stipulated their evidence or included it by mutual consent in their briefs. As hereinafter shown, this is both impracticable and impossible in this case.

B. In its brief plaintiff fails to challenge the sufficiency of defendant's answer. All of plaintiff's contentions are grounded upon its own conclusions of fact which defendant disputes, especially those concerning the intention of the parties to the Annexation Agreement.

C. An adjudication of the issuable facts cannot properly be made on the pleadings nor by application of judicial notice.

1. The motion is hypothetical in character, because the plaintiff does not assert that it is entitled to a judgment solely on the pleadings, nor to summary judgment by virtue of matters outside the pleadings, which it presents to the Court; and because the plaintiff does not specify what facts it would have the Court judicially notice nor even assure the Court that there are such facts. Instead, in its motion for judgment plaintiff reserves "the right to trial on any issues of fact which cannot be resolved by judicial notice." Plaintiff submits its case only for an adjudication favorable to it, and on an uncertain and hypothetical basis.

2. Plaintiff's motion cannot be sustained solely on the pleadings or as a summary judgment. Judgments on the pleadings and summary judgments are harsh procedures in that they foreclose a defendant from all opportunity to develop his defenses at trial.

In ruling on a motion for judgment based solely on the pleadings, all issues of fact and mixed issues of fact and law are resolved in favor of the non-moving party. Nor is a summary judgment for the plaintiff proper by virtue of matters dehors the pleadings, unless it is indisputably clear that there is no genuine fact issue and the plaintiff is, as a matter of law, entitled to judgment. Plaintiff fails by affidavits or otherwise to assure the Court that this is so. On the contrary, an analysis of plaintiff's and defendant's briefs demonstrates convincingly that a genuine fact controversy exists. Furthermore, a summary judgment is seldom proper in a case involving large public issues.

3. An adjudication cannot properly be now made by an application of judicial notice. The plaintiff has not given notice, as it is required to do under the doctrines of judicial notice, of the matters which it claims the Court must judicially notice and which entitle it to judgment; nor does it assure the Court that these facts exist. On the contrary, plaintiff's brief shows, and defendant's brief demonstrates in detail, that the issuable matters in this case are disputable and, under established principles of judicial notice, are, therefore, triable. It is not feasible for defendant to submit its factual case through the medium of a brief, due to the limitations of space, the short time afforded for preparation, and the impossibility of making an orderly and coherent presentation of its rights except through a trial record, followed by brief and argument directed thereto. Under the decisions of this Court, and the law as



stated by the authoritative commentators, the defendant is entitled to an opportunity to present its controverting testimony at trial.

D. The pleadings of the State denying ownership in the United States and claiming that Texas owns the lands and minerals, subject to paramount governmental powers, raise fact issues which should be developed to aid the Court in making its final conclusion on the ultimate issues of fact and law in this case. In order to demonstrate the necessity for full development of the evidence, the State outlines the nature of its defenses. They are not submitted for a determination on the merits but only to show its good faith in requesting a trial at which evidence can be heard. This is consistent with defendant's motion for appointment of a master on the day it answered. That motion is now pending.

1. a. As an independent nation, the Republic of Texas acquired ownership of the submerged lands and minerals within its three-league marginal belt by establishing and maintaining that area within its statutory boundaries from 1836 to 1845. The Republic made its boundaries known to the United States and other major nations of the world before being recognized by them, and no objection was made to its seaward limits. The boundary was reasonable, accepted by other nations, and maintained and protected by the Texas Navy. The boundary was read to both Houses of the United States Congress before recognition and before annexation, and Texas officials insisted that the boundaries be maintained and protected by the United States as a part of the Annexation Agreement. During the negotiations, Pres-



ident Polk advised General Sam Houston of Texas that the United States would "not allow the Texan rights of territory to be sacrificed." On the same subject, President Polk wrote A. J. Donelson, negotiator for the United States: "Of course, I would maintain the Texas title to the extent which she claims it to be."

The United States later officially recognized the Texas three-league boundary and followed it in establishing the line between the United States and Mexico in the Treaty of Guadalupe Hidalgo in 1848. Plaintiff pretends not to question the validity of the boundaries but does question their effect and recognition. Plaintiff contends that the concept of ownership of the bed of a marginal belt within seaward boundaries had not been fully developed by 1836-1845. This is contrary to the position taken by the United States in the *California* case when it was seeking to establish that the concept had developed sufficiently to enable it to have obtained the ownership of the California marginal belt from Mexico in 1848. It is also contrary to the opinions of all jurists and publicists who wrote on the subject between 1670 and 1845, as well as practically all writers on the subject since 1845. (See chronological chart of Opinions of Jurists and Publicists, 1670-1950, Appendix: p. 18.)

Not only was Texas' ownership to the property established in accordance with international law, but the Congress of the Republic of Texas extended its domestic law over the area. Under its mineral law, inherited from Spain and Mexico, the Republic of Texas held a separate estate in the mines and min-

erals beneath the lands, whether private, public, or common, within its boundaries. This mineral law was specifically retained as an exception when Texas adopted the common law in 1840. The separate mineral estate definitely extended beneath the marginal belt within its boundaries the same as beneath all other waters and uplands. It included oil and other "juices of the earth," and this separate estate in the land in controversy has been maintained continuously under Texas laws and is now vested in the Permanent School Fund of the State of Texas.

If there was any doubt about its ownership of this property prior to 1840, it was removed when Texas adopted the common law in that year. Without question, the common law provided for sovereign ownership of lands beneath the marginal sea and all other navigable waters within its borders.

In any event, the Republic of Texas acquired at least all proprietary rights in the area which plaintiff contends that the United States acquired in the marginal belts of the original thirteen States by exercising national dominion thereover. (*United States v. California, supra.*) These proprietary rights have been recognized by plaintiff, by this Court, and by practically all jurists and publicists from 1670 to 1950 as being separable from governmental powers over the area. (See full discussion of this point by Dean Roscoe Pound at page 1 of Memoranda and Appendix in this brief.)

b. Prior to annexation the Republic of Texas had offered to transfer to the United States all of its territory, including lands, mines, and minerals, if the United States would assume the Texas debt of ap-

proximately ten million dollars. A treaty to this effect was signed by the presidents of the two nations in 1844, but it was rejected by the United States Senate. One of the main grounds of objection was that Texas lands were "worthless" and would never amount to enough to pay the debt. It was argued that Texas should keep its lands and pay its own debts. The same Congress therefore made a counter-proposal by a Joint Resolution which was accepted by the Congress of the Republic of Texas. It provided that Texas pay its own debts, and, after ceding certain types of listed property *then used* by the Republic for defense purposes, that the successor State should retain all "vacant and unappropriated lands *lying within its limits*, to be applied to the payment of the debts and liabilities of said Republic of Texas, and *the residue of said lands, . . . . to be disposed of as said State may direct. . . .*" Plaintiff in its brief makes many erroneous assumptions and conclusions of fact concerning the meaning of this retention. Contrary to its interpretation in the *California* case that its retention of "public lands" in California included submerged lands of the marginal belt, the plaintiff here contends that "vacant and unappropriated lands" are synonymous with "public lands" and that their retention to Texas does not cover submerged lands of the Texas marginal belt. For more than a year counsel for Texas have been gathering letters, diplomatic correspondence, newspaper files, maps, and other documents from the National Archives, Texas Archives, and all other official and private sources possible on this question. It has an abundance of evidence and testimony which bear upon the inten-

tion of the parties to the Annexation Agreement and its subsequent interpretation by the State and the United States. This evidence will show a continuous chain of understanding and interpretation that the State retained all proprietary rights to the lands and minerals in controversy, and that no property was to be ceded to the United States except that which was later inventoried, conveyed, and accepted by United States officials as full compliance with the Agreement. These subsequent interpretations include letters and opinions of the Attorney General of the United States and the Secretary of the Interior, as well as the parties who actually negotiated the Agreement on behalf of the two nations. Defendant requests the opportunity to develop this and other evidence on fact issues which plaintiff admits in its brief to be involved in this case.

Plaintiff argues that the "equal footing" clause and the defense, boundary adjustment, and other national sovereignty clauses in the Annexation Agreement indicate that the lands in controversy were not intended by the parties to be included within "lands lying within its limits" retained by Texas. Plaintiff does not argue that these governmental powers are inseparable from the lands and minerals, but contends that they cast light on the intention of the parties with respect to these lands. Defendant is prepared to prove that the parties who negotiated this agreement in 1845 believed at that time that these and all other submerged lands within State boundaries were owned by the respective States even without being mentioned in a retention or granting clause. Letters, speeches, and other documents will

show conclusively that no one at the time made any contention that these lands would not belong to the new State. In fact, an application of the "equal footing" understanding of that day, especially in light of the Court's decisions which had then applied the sovereignty and equal footing doctrines to submerged lands, is fatal to plaintiff's interpretation of the intention of the parties. At that time, two Supreme Court decisions had been written holding that the States owned the lands beneath all navigable waters within their boundaries. The understanding of the parties at the time must be given controlling effect as to whether they meant what they said, or had something else in mind, when they agreed that Texas should retain all of the lands "lying within its limits."

Mines and minerals were originally included in the proposed cession to the United States in all drafts of the Joint Resolution until the final amendment which was adopted. It struck out "mines and minerals" from the cession and broadened the retention clause in favor of the State so as to read "vacant and unappropriated lands" instead of "public lands." Regardless of the fact issue attempted to be raised by the plaintiff as to the meaning of these terms, it is certain that the lands and minerals in question were never conveyed to the United States by the Annexation Agreement or otherwise and that all proprietary rights therein are held by the Permanent School Fund of the State of Texas.

c. The State also has affirmative defenses of prescription and estoppel which are not of the nature considered or passed upon in the *California* case.



Texas' prescriptive rights in these lands and minerals began while Texas was an independent nation and have continued under the same claim and possession by the successor State for 105 years after annexation. The State is entitled to introduce its evidence of this long-continued use and possession acquiesced in by the United States and other nations of the world, especially since plaintiff has contended that the land was not claimed or used until recently. The doctrine of prescription was applied in favor of Texas in a case which involved lands claimed by the United States in the New Mexico territory.

d. The estoppel defense, on which defendant is also entitled to introduce evidence, is not based on unauthorized acts of federal officials. Rather it is based upon acts of the Congress and the President of the United States in recognizing Texas' boundaries and ownership and agreeing to protect them both prior and subsequent to Texas' change of position as an independent nation.

e. As to that part of the land in controversy on the continental shelf beyond Texas' original three-league boundary, the United States has failed to show any title or interest that would entitle it to a judgment restraining the State of Texas from exercising its legislative powers in the regulation, control, and licensing of its own citizens in the exploration, development, and conservation of these lands. The Presidential Proclamations on the continental shelf were intended only as assertions of jurisdiction *vis-a-vis* other nations and therefore did not amount to an assertion or determination of rights as between the United States and Texas. Until Con-

gress enters the field with conflicting legislation, the State has the right to continue with its regulations. (*Toomer v. Witsell*, 334 U.S. 385 (1948); *Skiriotes v. Florida*, 313 U.S. 69 (1941).) This interpretation is confirmed by an Executive Order and a White House press release issued contemporaneously with the Presidential Proclamations on September, 28, 1945, and published with the Proclamations in the Department of State Bulletin. The latter said:

"The policy proclaimed by the President in regard to the jurisdiction over the continental shelf does not touch upon the question of Federal versus State control. It is concerned solely with establishing the jurisdiction of the United States from an international standpoint." (13 Dept. State Bull. (1945) 484.)

f. In any event, Texas should not be prohibited from exercising its legislative power to "preserve and regulate the exploitation of an important resource" within its borders, in the absence of conflicting national legislation. See *Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

2. Plaintiff has attempted to raise fact issues on the value, claim, and use of these lands during and since the days of the Texas Republic; the customs and usages of nations as to the extent of boundaries and ownership of lands beneath the marginal belt; the intention of the parties to the Annexation Agreement; and many other issues which require that plaintiff's motion for judgment on the pleadings be overruled in order that defendant may have an opportunity to develop its evidence. Defendant has listed many of the fact assumptions or conclu-

sions relied upon by the United States in its brief. (See page 65 of Memoranda and Appendix included in this brief.)

3. The disputed character of the fact issues involved, the time element, and uncertainty of judicial notice, render it impossible for defendant fully to present the merits of its case through judicial notice alone.

E. The established practice of this Court in original actions is to allow full development at trial of all factual issues, unless as in *United States v. California*, 332 U.S. 19, 24 (1947), neither party suggests "any necessity for the introducing of evidence," or the facts are stipulated or otherwise agreed upon. Similarly, in the district courts a party is not foreclosed from the development at trial of any genuine fact issue; and particularly is this true in cases of public import. These principles should be applied to the case at bar because of its magnitude, public importance, and the genuine factual defenses of the defendant.

### III.

If the plaintiff's motion is not now overruled, its disposition should be deferred until the evidence is fully developed at trial in accordance with this Court's practice that original cases should go to issue and proof; and in accordance with the like practice in the district courts, under Federal Rule 12 (d), of deferring until a trial the issues of the character presented by plaintiff's motion. The important issues in this case require the coherent pres-

entation and full consideration of all the facts that can only be made and adduced at trial.

## ARGUMENT

### I. This case is not controlled by *United States v. California*.

This case involves the same type of land as that involved in the *California* case, but the history, evidence, and law relating to the ownership here in controversy are entirely different. Even the plaintiff does not contend that the *California* decision controls this case as a matter of law if Texas' defenses, different from those of California, are found to be valid.<sup>21</sup> Plaintiff offers the *California* case as a "*prima facie* postulate," the principles of which are said to govern—"unless a particular State can show special reason for different treatment."<sup>22</sup> (Emphasis supplied throughout unless otherwise indicated.)

The "special reasons" applicable here and the vital distinctions between the *Texas* case and the *California* case have been developed fully by Mr. Charles Cheney Hyde,<sup>23</sup> in a memorandum attached to this brief at page 12 of the Memoranda and Appendix. Reference is here made to his memorandum for a more complete statement of the differences between these two cases.

Briefly summarized, the State of California had no interest in the marginal belt involved in its case

<sup>21</sup> Plaintiff's brief at 11, 20.

<sup>22</sup> *Id.* at 11, 20.

<sup>23</sup> Mr. Hyde is author of *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed. 1945); former Solicitor for the Department of State; and Professor of International Law at Columbia, 1925-1945.

except what it had acquired from the United States under the laws and Constitution of the United States. California had not been an independent nation possessed of both sovereignty and property rights in the subsoil of its marginal belt. California based its claim mainly upon an interpretation of the effect of the equal footing clause in its Act of Admission.

On the other hand, Texas' rights and ownership accrued to it as an independent nation from 1836 to 1845. The Republic of Texas acquired both sovereignty and ownership in its own right in the subsoil and minerals beneath that part of the Gulf which it brought within its seaward boundaries on December 19, 1836. The United States has no proprietary interest in the marginal belt except what it acquired from the Republic of Texas *by force of the Annexation Agreement*. The question presented in this case is whether Texas transferred its ownership of these lands and minerals, or any interest of a proprietary nature therein, to the United States. Since they had been for ten years within the boundaries of and subject to the domestic law of the Republic of Texas prior to an annexation agreement which left them subject to the existing Texas boundary and property laws, there is no other source from which the United States could have obtained them. In 1845 the area was not subject to original acquisition by the United States through the application of external sovereignty. The national dominion and domestic law of a prior sovereign already extended over the area.

As said by Mr. Hyde, Texas, upon annexation, transferred to the United States "only its governmental powers of national sovereignty—*not its lands*



or rights of substance theretofore acquired by its own use of those powers." (Hyde Memorandum, Memoranda and Appendix, p. 17.)

Plaintiff contends now for a different interpretation of the intention of the parties to the Annexation Agreement. By its implied admission that Texas must prevail if the intention of the agreement was that Texas retain this property, and by reliance upon conclusions of fact for its argument against that interpretation, plaintiff has demonstrated the vital difference between the *California* case and the *Texas* case more effectively than anything defendant might add.

In this case, there is a fact issue calling for a full development of all the evidence relating to the intention of the two independent nations in their concurrent adoption of this act of union. Plaintiff does not even contend that its interpretation can prevail as a matter of law, because by the express words of the agreement on its face Texas retains these and all other lands "lying within its limits," except certain enumerated types of defense property which did not include the lands and minerals in question. As is so well demonstrated in plaintiff's own brief, the United States' interpretation requires a determination of fact based upon extraneous evidence in order for it to prevail over the plain words of the agreement. Accordingly, defendant should be given the opportunity to refute that evidence with evidence of its own showing that the parties meant exactly what they said—that these lands and all proprietary claims thereto were retained by the new State, subject of course to the paramount governmental powers transferred to the United States.

Likewise, these circumstances show the necessity in this case for a different trial procedure from that agreed to by the parties in the *California* case. In that case there were no controlling fact issues involving the intention of the parties to a written agreement between nations nor were there the many years of history, negotiations, and subsequent construction relating thereto. The evidence which was thought material by California was originally set forth at length in a three-volume answer of 822 pages. This answer plainly did not comply with modern federal practice which requires a defendant to set forth its defenses in short and plain terms. As a result of plaintiff's Motion to Strike, California withdrew the evidence and its arguments on the law and the facts from its answer, and refiled them in a revised form as a two-volume brief in opposition to plaintiff's Motion for Judgment. The hearing in that case, while in form a motion for judgment on the pleadings, actually was by mutual understanding a trial on the merits, both fact and law, as shown by the briefs of the parties and the opinion of this Court. *United States v. California*, 332 U.S. 19 (1947). As will be hereafter shown, it is impossible for the

<sup>21</sup> The foreword of California's brief said:

"The brief filed by plaintiff herein contains not only arguments upon the pleadings but is a presentation of its entire case, both upon the law and the facts. The State of California in its brief has met all the legal and factual issues presented by plaintiff and has also set forth the affirmative basis of California's title. The briefs and the oral argument, therefore, constitute the subject matter of an original trial of the cause on all issues, both of fact and law. The material contained in the appendix constitutes, in the main, the factual data which, in a case on appeal, would be contained in a transcript of evidence."

State in this case to make a full development of its evidence in its brief. It is not required to do so by the rules of procedure and decisions of this Court.

In summary, this case involves none of the fact issues raised by California in its case. Texas' defenses raise issues of law and fact not presented to, or decided by, the Court in that case; and the disputed fact issues are not now before this Court for adjudication.

That Texas possessed special defenses was responsibly and repeatedly acknowledged by the Attorney General of the United States in his testimony before Congressional Committees in 1948.<sup>25</sup> Mr. Justice Clark, then Attorney General, testified that on the day he argued the *California* case in Court, March 13, 1947, he handed to the press a written statement referring to other States. His statement concerning Texas was to the effect that Texas owned and retained all the lands within its boundaries, including the marginal sea area.<sup>26</sup> Solicitor General

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<sup>25</sup> Joint Hearings Before the Committees on the Judiciary, 80th Cong., 2d Sess. on S. 1899 and Similar House Bills, February-March 1948, 616, 617, 635, 689, 690.

<sup>26</sup> *Id.* at 689. The statement read: "Attorney General Clark today, in answer to inquiries regarding his Supreme Court appearance on behalf of the United States in the famous Tidelands Case emphasized the fact that the case involves only the area off the coast of California."

"Whatever the decision of the court may be in the California case it would not be decisive as to the rights of any other state. . . . Other coastal states are on an entirely different footing.

"When asked regarding his native State of Texas, the Attorney General pointed out that Texas had been an independent nation, a republic, for ten years before joining the

Perman, in testimony before the House Judiciary Committee, said:

"As you know, Texas has special defenses that it is entitled to make that did not apply in the case of California."<sup>27</sup>

Relevancy of Texas' previous status as an independent nation has been similarly recognized by other executive officials.<sup>28</sup>

**II. Plaintiff is not now entitled to judgment disposing of this case on the pleadings and the motion for judgment should be denied.**

### *Statement*

The plaintiff's motion for judgment is essentially a motion for judgment on the pleadings. For the pur-

Union. As a republic it owned all of the lands within the boundaries, including the marginal sea commonly called tidelands. This area similar to that involved in the California case extended into the Gulf of Mexico and was under the sovereignty of Texas during the Republic and was retained by it under the provisions of the Act of Admission."

<sup>27</sup> Hearings Before Sub-Committee No. 1, House Judiciary Committee, 81st Cong., 1st Sess. on H. R. 5991 and H. R. 5992, August 29, 1949, Reporter's Transcript, Vol. 3, p. 373.

<sup>28</sup> *President Andrew Jackson*: "The title of Texas to the territory she claims is identified with her independence." Cong. Globe, 24th Cong.; 2nd Sess. (1836-1837), p. 45.

*President Harry S. Truman*: "Texas is in a class by itself; it entered the Union by Treaty." (Speech at Austin, Texas, September 20, 1948.)

*Former Interior Secretary Harold L. Ickes*: "Parenthetically, Texas may have the legal right to its tidelands because it came into the Union voluntarily and as an independent country." (Address over ABC Network, October 14, 1948.)

poses of this hearing it necessarily admits the well-pleaded material allegations of the defendant's answer and the fact elements necessary to support them.<sup>30</sup> In its complaint plaintiff has pleaded that it was and is now the "owner" in "fee simple" of, or possessed of "paramount rights" in, and full "dominion and power" over, the lands and minerals within Texas' gulfward boundaries.<sup>31</sup> Defendant was unable to obtain a more definite statement of plaintiff's claim.<sup>32</sup> It was therefore forced to deny this allegation in the same general terms subject, of course, to the admitted constitutional paramount rights of the United States.<sup>33</sup> It also pleaded three special defenses, each of which negatived plaintiff's claim of ownership.

This abbreviated form of pleading is permitted in United States District Courts under the Federal Rules of Civil Procedure and by analogy in this Court. Such pleadings develop ultimate mixed issues of law and fact. The only way that the substance of plaintiff's case and of defendant's defenses can be determined by the Court is through introduction of evidence at a trial or by submission to the Court of affidavits, depositions, admissions and other kindred forms of proof. No such proof has been submitted by either party thus far in the present case.

Therefore, the present hearing is not in any proper sense a trial. If the pleadings raise material fact issues which are in dispute between the parties, a

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<sup>30</sup> See p. 44, *infra*.

<sup>31</sup> Motion for Leave to File Complaint and Complaint, p. 6.

<sup>32</sup> See Plaintiff's Motion for More Definite Statement.

<sup>33</sup> First Amended Answer of the State of Texas, p. 4.



motion for judgment on the pleadings should be denied. By the same token the presence of these disputed questions of material fact make the rendering of summary judgment by analogy to Rule 56 of the Federal Rules of Civil Procedure likewise improper.<sup>31</sup>

**A. Plaintiff's Pleadings, Denied by the Defendant, Raise Ultimate Mixed Issues of Law and Fact on Which Full Development of the Evidence Should Be Had.**

The basic allegations of the complaint, such as "owner in fee simple," "possessed of paramount rights in and full dominion and power over," "trespass," and similar allegations are mixed conclusions concerning ultimate propositions of fact and law. The answer adequately controverts these mixed conclusions. It denies plaintiff's assertion of ownership and any other claims of a proprietary nature severable from governmental powers.

It is elementary that allegations of ownership or title when appropriately denied, as here, present a mixed question of law and fact. As this Court said in *Richardson v. Boston*, 19 How. 263, 268 (1857), "Title is often a question of mixed law and fact." See also *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161 (1886). In such a situation it was held to be error to grant a motion for judgment on the plead-

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<sup>31</sup> See p. 44, *infra*.

<sup>32</sup> See p. 45, *infra*.

ings in *McGrath v. Valentine*, 167 F. 473, 477 (1909), where the court said:

"The answer denied the title of the defendant in error except as thereafter stated, and it not only admitted no title in him, to any portion of lot 2, but it expressly alleged title in McGrath as to a certain described portion thereof, in which is included the land in that lot which by the judgment was awarded to the defendant in error. This was a distinct issue, as to which the plaintiffs in error were entitled to a trial by jury, and as to which it was error to enter a judgment for the defendant in error on the pleadings."

So in *Union Water Co. v. Crary*, 25 Cal. 509, 85 Am. Dec. 145, 147 (1864), where the dispute arose with regard to appropriation of the waters of a stream, the court said:

"The plaintiff is not entitled to a judgment on the pleadings, for the defendant denies the right of the plaintiff, except where the water has receded to four inches, and he sets up title in himself; and we hold that those matters, as set up in the answer, do constitute a defense to the plaintiff's action."<sup>23</sup>

<sup>23</sup> Accord: *J. D. Best & Co. v. Wolf Co.*, 67 Colo. 42, 185 Pac. 371 (1919); *West v. Bank of Commerce & Trust*, 153 F. (2d) 566, 568 (C.C.A. 4th 1946); *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680 (1898); *Hicks v. Lovell*, 64 Cal. 14, 27 Pac. 942, 943 (1883); *Johnson v. Manning*, 3 Idaho 352, 29 Pac. 101, 102 (1892); *State v. Dilworth*, 70 Mont. 218, 246 Pac. 167 (1926) (citing cases from Nebraska, Michigan, Iowa, North Carolina, Illinois, and Georgia in support); *Rhoades v. McDouell*, 156 N. W. 526 (Ohio App. 1927).

The fact that in the present case there is a dispute over the intention of the parties to an international agreement bearing on the issue of ownership makes the application of the general rule here more compelling. Even where the dispute was over the meaning of certain private correspondence this Court has recognized the applicability of this rule. In *Rankin v. Fidelity Trust Co.*, 189 U.S. 242, 252-253 (1902), it said:

"The case then really turned upon the actual ownership of the shares, and this question was properly left to the jury as one of fact. Although the construction of written instruments is one for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury."

In the case of *Morris v. United States*, 174 U.S. 196 (1898), the bill in equity alleged in part that the land in controversy was a part of the Potomac River subject to tidal overflow and was therefore reserved to the United States for public uses under the cession of 1839 from Maryland. The Court said in part:

"By their answers the claimants under the patent denied these several allegations and un-

\* See also: *United States v. Schurz*, 102 U.S. 378, 401, 402 (1880); *United States v. Northern Pacific Ry. Co.*, 152 U.S. 284, 291-292 (1893); *Hill v. McCord*, 195 U.S. 395, 400 (1904); *Worth v. Standard Oil Co.*, 278 U.S. 200 (1929). Cf. *Curtner v. United States*, 149 U.S. 662, 673 (1892); *United States v. King & Co.*, 7 How. 833 (1849); *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307 (1887); *Pedro & Cañon del Agua Co. v. United States*, 146 U.S. 120 (1892); *United States v. Chaves*, 159 U.S. 452 (1895).

der the issues of law and fact thus raised, a large amount of evidence was taken." (174 U.S. at 233-234.)

By a parity of reasoning the ownership or paramount proprietary rights in the lands and minerals in controversy depend upon mixed questions of law and fact.

In summary the material allegations of the complaint, properly put in issue by the answer, present on their face broad propositions embracing mixed questions of fact and law, and therefore the motion for judgment on the pleadings should be overruled.

**B. Plaintiff Does Not in Its Brief Challenge the Sufficiency of Defendant's Pleadings but Clearly Raises Issues as to Material Facts.**

The plaintiff in its brief has conditioned the judgment it seeks on its own interpretation of the intention of the parties to the Annexation Agreement, and particularly on its interpretation of the clause by which Texas retained all vacant and unappropriated lands. Nowhere in its brief does it contend that the answer is insufficient as a matter of law.

This becomes apparent upon reading plaintiff's Summary of Argument (Plaintiff's brief, pp. 11-18). Point I reads, "The principles of *United States v. California* govern this case." But the United States qualifies this in the following terms, "unless a particular State can show special reason for different treatment." (Plaintiff's brief, pp. 11, 20.) In Point II, the plaintiff proceeds to argue against what it recognizes would be, if sustained, a special reason for different treatment. While devoting two pages of its argument to Point I, it devotes 47 pages to Texas'

defenses without once contending that they are insufficient as a matter of law. The plaintiff first discusses the interpretation of the clause "vacant and unappropriated lands" and sets forth many conclusions of fact reached solely through its own inferential processes. The United States then contends that the status of Texas as an independent nation is immaterial but assumes the establishment of its prior interpretation of the Annexation Agreement as a necessary premise for the point. (Plaintiff's brief, p. 52.) Plaintiff concludes its discussion of Texas' defenses by again making its own interpretation of the intention of the parties to the Annexation Agreement, directing this discussion to "the 'defence' clause," "the 'equal footing' clause," "the 'boundary adjustment' clause," and "the 'proper territory' clause," as indications bearing upon such factual interpretation. As shown in plaintiff's brief and our subsequent discussion, plaintiff's interpretation cannot be sustained as a matter of law. The intention of the contracting parties to the Annexation Agreement and other treaties and agreements, as shown by surrounding circumstances, negotiations, and subsequent construction put upon these documents, is an ultimate fact issue which is controlling.

• Plaintiff's own brief proves fatal to its position on this motion for judgment on the pleadings. Its substance and form can be searched from introduction to conclusion without finding statement or argument that Texas' defenses, if supported by proof, are invalid and unavailing as a matter of law. Therefore, the motion for judgment should be overruled in order that full development of the evidence may be had.



**C. An Adjudication of the Issuable Facts Cannot Properly Be Made Now in Plaintiff's Favor on the Pleadings nor by an Application of Judicial Notice.**

*1. Plaintiff's motion is hypothetical in character.*

The complaint and answer have framed the basic issues as to ownership of the lands and minerals in question. There is no record in the case. By the pending motion the plaintiff asks for judgment as a matter of law. This is in effect a renewal by the plaintiff of its earlier motion for judgment on the complaint, which this Court denied October 10, 1949. The theory of that motion was necessarily bottomed on the proposition that the defendant could present no triable issue and that as a matter of law the plaintiff was entitled to judgment. The theory of the pending motion is the same and can be sustained only if the plaintiff establishes that it is entitled as a matter of law (1) to judgment on the pleadings, qua pleadings; or (2) to summary judgment by virtue of matters dehors the pleadings, which it presents to the Court and which show that it is indisputably clear there is no genuine issue of triable fact; or (3) that by virtue of judicial notice all the facts can and must now be resolved in favor of the plaintiff.

For reasons subsequently set out, the first two propositions cannot be seriously maintained, and the plaintiff is apparently relying largely, if not exclusively, on the third proposition that all the issuable facts are subject to judicial notice. But it does not set out these facts. They remain indefinite.

And they are hypothetical because the plaintiff in its motion for judgment reserves "the right to trial on any issues of fact which cannot be resolved by judicial notice." Hypothetical, (1) because the plaintiff does not assert that it is entitled to a judgment on the bare bones of the pleadings, nor to summary judgment by virtue of matters which it presents to the Court; and (2) because it does not set out and state that there are certain facts (enumerating them) which entitle it to judgment, of which this Court can and must now take judicial notice and that, as a consequence, there is no triable issue notwithstanding those raised by the pleadings. Instead, plaintiff argues at great length in its brief about the facts and law and argumentatively draws mixed factual and legal conclusions. Indeed, while refraining from specifying the facts which plaintiff would have the Court judicially notice, and which would entitle it to judgment, plaintiff does not even assure the Court that there are such facts, but reserves "the right to trial" as quoted above. The plaintiff is not entitled to a second trial run on matters dehors the pleadings without clearly and definitely stating what those matters are, or that they do exist. And by virtue of the reasons and materials, which we subsequently set out in detail, the crucial question as to ownership involves disputed fact issues upon which the defendant is entitled to trial.

2. *Plaintiff's motion cannot be sustained solely on the pleadings or as a summary judgment.*

A motion by plaintiff for judgment on the pleadings can be granted only where the plaintiff states a

cause of action and defendant's answer fails as a matter of law to controvert at least one material allegation. Where the pleadings, qua pleadings, sufficiently raise an issue, the plaintiff is entitled to a summary judgment only where he shows the court that, although the pleadings raise a triable issue, it is, nevertheless, indisputably clear that there is no genuine issue of fact to be tried, and that as a matter of law plaintiff is entitled to judgment.

Possible issues arising on a motion for judgment on the pleadings are, ~~for the~~ purpose of the motion, resolved in favor of the non-moving party. *Clark v. Allen*, 331 U.S. 503, 516 (1947); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456-457 (1945). Where a case proceeds to judgment on the pleadings, "... it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true." *Postal Telegraph Cable Co. v. City of Newport, Ky.*, 247 U.S. 464, 474 (1918). These principles enunciated by this Court have been consistently applied by the lower Federal Courts.<sup>37</sup>

The answer is clearly sufficient as a pleading. This is virtually admitted by the plaintiff for, as shown above, nowhere in its brief does plaintiff attack the legal sufficiency of the defendant's answer. Under the decisions of this Court and the lower Federal courts plaintiff's motion cannot be sustained as a motion directed solely to the pleadings.

<sup>37</sup> *Wittlin v. Giacalone*, 154 F. (2d) 20, 21-22 (App. D.C. 1946); *Blackmer v. Thatcher*, 145 F. (2d) 255, 259-260 (C.C.A. 9th, 1944), cert. den. 324 U.S. 848, *Friedman v. Washburn Co.*, 145 F. (2d) 715 (C.C.A. 7th, 1944); *Ulen Contracting Corp. v. Tri-County Electric Cooperative*, 1 F.R.D. 284 (W.D. Mich. 1940); 2 Moore's Federal Practice (2d ed.), ¶ 12.15.

Nor can plaintiff's motion be sustained as a motion for summary judgment by virtue of matters outside the pleadings. Nowhere does the plaintiff set out the facts upon which it relies for judgment. Had it done so, plaintiff still would not be entitled to foreclose the defendant from a trial unless it was indisputably clear that there was no genuine controversy as to those facts. Thus in reference to Rule 56, which governs summary judgment in the *nisi prius* district courts, this Court has stated that the rule "authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial," *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 627 (1944); and that "Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial when there is a bona fide dispute of facts between them." *Associated Press v. United States*, 326 U.S. 1, 6 (1945). And in *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 719 (1945), this Court stated that a summary judgment "must be taken to have held that, upon the pleadings and the affidavits, no genuine issue of material fact was presented." And it went on to affirm the judgment of the Court of Appeals, wherein Mr. Justice, then Judge, Minton, in reversing a summary judgment, had stated the conclusions in these terms:

"The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have

judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained." 140 F. (2d) 488, 490 (C.C.A. 7th, 1944).

The Courts of Appeals have consistently followed the foregoing principles set out by this Court and are in general agreement among themselves that a summary judgment may be granted only where it is indisputably clear that there is no genuine fact issue. And, furthermore, this Court has recognized and stated that seldom will a summary judgment be proper in a case involving large public issues.

"Judgment on issues of public moment based on such evidence [affidavits], not subject to probing by judge and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment. Modern equity practice has tended away from a procedure based on affidavits and interrogatories, because of its proven insufficiencies." *Eccles v. People's Bank*

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See *Dewey v. Clark*, 13 F. R. Serv. 56c.41, Case 10 (Ap., D.C. 1950) (for an extensive and summarizing opinion); *Sarnoff v. Ciaglia*, 165 F. (2d) 167 (C.C.A. 3d, 1947); *Campana Corp. v. Harrison*, 135 F. (2d) 334 (C.C.A. 7th, 1943); *Lane Bryant, Inc. v. Maternity Lane, Ltd. of California*, 173 F. (2d) 559 (C.C.A. 9th, 1949); 8 *Cyclopedia of Federal Procedure* (2d ed. 1943) §§ 3502-13, especially §§ 3502, 3503; 3A *Ohlinger's Federal Practice* (rev. ed. 1948) 297-340, especially §§ 56[3] - [3.2], [6.2] - [6.4]; 3 *Moore's Federal Practice* (1st ed. 1938) § 56.04, and accompanying Supp.



of *Lakewood Village, Cal.*, 333 U.S. 426, 434 (1947). See also *Arenas v. United States*, 322 U.S. 419, 434 (1944).

In *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), Mr. Justice Jackson stated: "The manner in which the case has thus far developed raises the question whether as a matter of good judicial administration this Court should attempt to decide these far-reaching issues on this record." He went on to hold that it should not so decide, and that the summary judgment should be vacated.

The plaintiff's motion cannot therefore be sustained as a motion for summary judgment on matters dehors the pleading unless all the facts which entitle the plaintiff to judgment can and may now be resolved in favor of plaintiff by judicial notice. To this proposition we now turn.

3. *An adjudication cannot properly be now made by an application of judicial notice.*

Nowhere does the plaintiff set out the facts which it claims this Court should judicially notice and which entitle it to judgment. Plaintiff's brief inextricably weaves factual inferences, which it asks this Court to accept, with its conclusions of law. The brief should not take the place of a record made at a trial. It is, as briefs normally are, a series of arguments on law as applied to facts, but subject to the following important exception. In the present case there is no trial record and plaintiff attempts to supply it through the medium of its brief. There is another factual side of the case which the

defendant will show to the Court immediately after the present discussion of judicial notice. It will suffice at this point, however, to note that there is a complete lack of clarity and concreteness as to what facts plaintiff claims are subject to judicial notice. And, as previously stated, because of the uncertainty as to the facts, which plaintiff claims the Court must now judicially notice, and because the plaintiff reserves "the right to trial on any issues of fact which cannot be resolved by judicial notice," plaintiff's motion is hypothetical in character. This posture of the case should now be borne in mind in considering the two authoritative theories concerning the doctrine of judicial notice and its proper application: the Thayer-Wigmore, and the Morgan theory.

Under the Thayer-Wigmore theory, which has been endorsed by such eminent jurists as Mr. Justice Cardozo<sup>39</sup> and Judge Learned Hand,<sup>40</sup> facts which a court may judicially notice do not for that reason become indisputable in the sense that they are not subject to rebuttal by evidence.<sup>41</sup> And according to this view notice must be given to the party against whom

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<sup>39</sup> *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937).

<sup>40</sup> *United States v. Aluminum Co.*, 148 F. (2d) 416, 446 (C.C.A. 2d, 1945).

<sup>41</sup> "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the Court *assumes* that the matter is so notorious that it will not be disputed. But the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable." 9 Wigmore on Evidence (3d ed. 1940) § 2567. (Author's emphasis.)

the matter, claimed to be judicially noticeable, is to be used.<sup>42</sup> It is clear then that under this theory of judicial notice and its applicability the plaintiff cannot prevail for it has failed to give notice of the facts which it wishes this Court to notice judicially. And, more important, even if it had done so or is subsequently permitted to do so, the State of Texas is permitted by the Wigmore theory and leading cases<sup>43</sup> to dispute by evidence the matter to be judicially noticed.

Under the other theory, espoused by Professor Morgan, judicially noticeable matter may not be challenged by evidence; but recognizing the danger of the doctrine when so applied he offers the following safeguards, which are concurred in by the Model Code of Evidence of the American Law Institute.<sup>44</sup> Professor Morgan states "that (a) the doctrine shall not be applied unless the litigant against whom the judicially noticed matter is to be used is given notice and opportunity to be heard as to the propriety of taking judicial notice and the exact content of the matter to be noticed and that (b) the judge is bound to decline to take such notice if the matter is not clearly indisputable."<sup>45</sup> As to "indisputability" the learned author says, "Whether or not a given matter is beyond the realm of dispute may itself be a subject of dispute among reasonable men at any

<sup>42</sup> *Id.* at § 2568.

<sup>43</sup> *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937); *United States v. Aluminum Co.*, 138 F. (2d) 416, 446 (C.C.A. 2d, 1945).

<sup>44</sup> Model Code of Evidence, American Law Institute, Rules 801-6.

<sup>45</sup> Morgan, *The Law of Evidence, 1941-1945*, 59 Harv. L. Rev. 481, 487 (1946).

given time or place and in such circumstances, the judge may require the parties to use the ordinary processes of proof.”<sup>10</sup> Thus, it is equally clear that the plaintiff cannot prevail under the Morgan theory; for plaintiff failed to specify “the exact content of the matter to be judicially noticed,” and had it done so, the State of Texas would be entitled to challenge both the propriety of judicially noticing the matter and its “indisputability.”

This Court as long ago as 1875 laid down a sound rule as to the use of judicial notice. “This power is to be exercised by Courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.” *Brown v. Piper*, 91 U.S. 37, 43 (1875). And this Court followed the “Thayer-Wigmore theory” in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937). In this case the commission, in making a valuation of the utility’s property, took judicial notice of price trends without placing the source of and the data in the record, and without giving the defendant company a chance to introduce rebutting evidence. Although, on review, the Supreme Court of Ohio approved the commission’s action, this Court found a denial of procedural due process because of the lack of opportunity to challenge the judicially noticed matter either at trial or upon judicial review in the state court. This Court said that to press the doctrine of judicial notice to matters not “notorious to the community” and to the extent attempted, “would be to turn the doctrine into a pretext for dis-

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<sup>10</sup> *Id.* at 485.

pending with a trial." Justice Cardozo, who wrote for the Court, stated: "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." 301 U.S. at 305. This Court's treatment of judicial notice in the *Ohio Bell Telephone* case has received the express approval of Congress in relation to federal administration procedure by the enactment of Title 5, U.S.C., § 1006(d).

Let us assume for the moment that the matters of fact to which the plaintiff refers in its brief are within the general realm of judicial notice. That means only that the plaintiff will not be called upon to prove them if the Court actually knows that they are true, or if they are not denied. It does not mean that they are to be taken as conclusively true in any event if the defendant elects to disprove them. Note that it is not for the plaintiff or even the Court to say that defendant shall not be permitted to disprove them. The option is with the defendant to disprove them if he can. This is of the essence of a trial. "Moreover," said Justice Cardozo, "notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, *Evidence*, § 2567; I Greenleaf, *Evidence*, 16th ed., p. 18. "It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." 301 U.S. at 301-302.

Further, the doctrine of judicial notice operates with one effect upon the party who invokes it and a distinct effect upon the party against whom it is



employed. The plaintiff, for example, resorting to it in lieu of the normal methods of making proof, should lay before the court the substance of the facts that are said to be properly noticeable; failing to do this, he leaves his burden undischarged. But the defendant, upon whom the doctrine is sought to be imposed, is not similarly called upon to present his proof in that form at all. If he prefers he may, *of right*, invoke the normal functions of the Court that are essential to a trial. He may, if he sees fit, ask leave to present evidence. He is not bound to resort to the substitute method merely because the plaintiff has, for his part, chosen to do so.

The plaintiff is attempting to invoke the doctrine of judicial notice in a manner that does not meet the minimal standards set by this Court, nor the standards of either the Thayer-Wigmore or the Morgan school of thought. Accordingly, the State does here and now object to the consideration of the evidentiary material included in the plaintiff's brief for the purpose of sustaining plaintiff's motion for judgment and thereby foreclosing the defendant of an opportunity to present its controverting testimony at a trial on the merits.

**D. Defendant's Pleadings Raise Special Defenses Which Entitle It to a Full Development of the Evidence, and Otherwise Show that Plaintiff Is Not Entitled to Judgment.**

In order to demonstrate clearly the nature and materiality of the disputed fact issues which have been raised, that they may not be conclusively deter-

mined by judicial notice, and the necessity for an opportunity to develop its evidence fully, defendant will present a summary of the nature of its defenses. However, neither the law points nor the fact issues can be disposed of properly in this proceeding, and they are not presented here for final disposition on the merits. The purpose here is to show the substantial nature of the defenses require full development of the evidence rather than a present summary disposition.

## 1. NATURE OF TEXAS' DEFENSES

- a. **The Republic of Texas, as an Independent Nation (1836-1845), Owned the Submerged Lands and Minerals within Its Three-League Gulfward Boundaries.**

Defendant contends that the Republic of Texas owned in proprietary right the seabed, subsoil, and minerals of the marginal sea belt embraced within its declared three-league boundaries, and that its right of ownership was distinct from, and in addition to, its right of sovereignty over the area "lying within its limits."

(1) *As an Independent Nation Texas Brought within Its Territory and Made Subject to Its Domestic Law the Shallow Marginal Belt of the Gulf Three Leagues from Shore.*

## INDEPENDENCE

On March 2, 1836, a convention assembled for that purpose declared

... that the people of Texas do now constitute a free, sovereign, and independent re-

public, and are fully invested with all the rights and attributes which properly belong to independent nations. . . ."

Fifty days after this formal declaration of independence the Texan forces led by Sam Houston routed the Mexican Army at San Jacinto, on April 21, 1836. Thereafter and until annexation to the United States in 1845, the power and authority of the Republic of Texas as an independent nation in full control of its territory was unquestioned. The independence of Texas was successively recognized by the United States, France, The Netherlands, and Great Britain.

President Andrew Jackson in a special message to the United States House of Representatives on December 22, 1836, stated that

"the title of Texas to the territory she claims is identified with her independence."

and the United States Senate on March 1, 1837, adopted a resolution formally recognizing Texan independence. The resolution was introduced by Senator Walker of Mississippi on January 11, 1837, and was accepted as originally submitted by him. It read:..

"Resolved, that the State of Texas having established and maintained an independent Government, capable of performing those duties,

<sup>17</sup> 1 Laws, Rep. of Texas, p. 6; 1 Gammel's Laws of Texas 1066.

<sup>18</sup> Congressional Globe, 24th Cong., 2d Sess., p. 45 (1836).

<sup>19</sup> *Id.* at 270.

foreign and domestic, which appertain to independent Governments, and it appearing that there is no longer any reasonable prospect of successful prosecution of the war by Mexico against said State it is expedient and proper and in conformity with the laws of nations and the practice of this Government in like cases, that the independent political existence of said state be acknowledged by the Government of the United States."

Congress passed an appropriation on March 3rd of that year for the salary of a diplomatic agent to Texas. Alcée La Branche was confirmed by the Senate on March 7th for the post of charge d'affaires to the Republic of Texas. Prior to that time the Republic had commissioned a minister plenipontentary to the United States in November and December, 1836. He was formally received in July, 1837.

Daniel Webster, Secretary of State of the United States, writing to the Mexican Minister in 1842, said:

"From the time of the battle of San Jacinto in April 1836, to the present moment, Texas has exhibited the same external signs of national independence as Mexico herself, and with quite

<sup>10</sup> *Id.* at 83.

<sup>11</sup> 5 Stat. 170 (1837).

<sup>12</sup> V Executive Journal 17, (1837).

<sup>13</sup> See I Garrison, George P., *Texan Diplomatic Correspondence*, 3 vols, published in Annual Report, American Historical Association 1907, 1908 (G.P.O. 1908, 1911) (hereafter referred to as "Garrison"), pp. 140-144; *Id.* at 165-166; Dept. State, 6 Notes to the Texas Legation 1-2, March 13, 1837; I Garrison 236.

as much stability of government. Practically free and independent, acknowledged as a political sovereignty by the principal followers of the world, no hostile foot finding rest within their territory for six or seven years and Mexico herself refraining, for all that period from any further attempt to reestablish her own authority over that territory . . . since 1837 the United States has regarded Texas an Independent Sovereignty, as much as Mexico. . . ."

This letter was repeated by Secretary of State Buchanan in a letter to the Mexican Minister on November 10, 1845.<sup>20</sup>

France formally recognized the Republic of Texas on September 25, 1839, by a treaty of amity, commerce and navigation, the preamble of which said, in part:

" . . . and which shall establish the formal recognition, on the part of France, of the Independence of the Republic of Texas. . . ."

A year later on September 18, 1840, by a similar treaty the King of The Netherlands accorded the recognition of that country.<sup>21</sup> It was immediately thereafter, in November, 1840, that Great Britain made its recognition effective by concluding three treaties with Texas.<sup>22</sup> Each of these nations sent

<sup>20</sup> VIII Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs* (Washington, 1937) 113-115.

<sup>21</sup> *Id.* at 178.

<sup>22</sup> Laws, Rep. of Texas, 5th Cong., Appendix, p. 1; 2 Gammel's Laws of Texas 655.

<sup>23</sup> Laws, Rep. of Texas, 7th Cong., p. xxvi; 2 Gammel's Laws of Texas 905.

<sup>24</sup> Laws, Rep. of Texas, 7th Cong., pp. i, vii, x; 2 Gammel's Laws of Texas 880, 886, 889.



diplomatic representatives.<sup>80</sup> Belgium also sent a diplomatic mission to Texas.<sup>81</sup>

A convention of friendship, commerce and navigation between the Republic of Texas and the Hanseatic Republic of Lubeck, Bremen and Hamburg was signed in Paris on April 17, 1844.<sup>82</sup> A letter of credence for Ashbel Smith as chargé d'affaires from Texas to Spain was sent to the Spanish Minister of Foreign Affairs on February 16, 1843.<sup>83</sup>

Thus the independence and national character of the Republic of Texas is a well-established historical fact which the plaintiff does not dispute.<sup>84</sup> By this suit, plaintiff, for the first time in the history of United States-Texas relations, questions the effect and the legal incidents which flowed from such independence.

#### DOMESTIC LAW OF THE REPUBLIC OF TEXAS

By its constitution adopted March 17, 1836, the Republic of Texas declared:

"That no inconvenience may arise from the adoption of this constitution, it is declared by this convention that all laws now in force in

<sup>80</sup> The United States sent six chargés d'affaires, Garrison, *passim*; France, a chargé d'affaires and consuls, III *id.* at 1222, 1270, 1280, 1282, 1362; The Netherlands, consuls, III *id.* at 963, 1563; Great Britain, a consul-general and consuls, III *id.* at 820, 942, 949.

<sup>81</sup> The entire history of these negotiations between the Republic of Texas and several European powers is fully discussed in Chase, Mary K., *Négociations de la République du Texas en Europe, 1837-1845* (Paris, 1932).

<sup>82</sup> III Garrison 1569.

<sup>83</sup> *Id.* at 1514.

<sup>84</sup> Brief in Support of Motion for Judgment, pp. 7, 52.

Texas, and not inconsistent with this constitution, shall remain in full force until declared void, repealed, altered, or expire by their own limitation.”<sup>64</sup>

This constitution thus continued in force the system of land laws and laws in regard to the ownership of subsoil mines and minerals which Texas inherited from the Republic of Mexico as successor to the Crown of Spain.

On December 19, 1836, the Congress of the Republic passed the following act:

“AN ACT To define the Boundaries of the Republic of Texas.

“Sec. 1. *Be it enacted by the senate and house of representatives of the republic of Texas, in congress assembled, That from and after the passage of this act, the civil and political jurisdiction of this republic be, and is hereby declared to extend to the following boundaries, to wit: beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning: and that the president be, and is hereby authorized and required to open a negotiation with the government of the United States of America, so soon as in his opinion the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty.*”<sup>65</sup>

<sup>64</sup> 1 Laws, Republic of Texas, p. 17; 1 Gammel's Laws of Texas 1077.

<sup>65</sup> Laws, Republic of Texas, p. 133; 1 Gammel's Laws of Texas 1193-1194.

Texas thereby applied its sovereignty and domestic law to the seabed and subsoil of this area.

Plaintiff's interpretation of the Act of December 22, 1837,<sup>2</sup> under which the General Land Office of Texas was actually organized is wholly erroneous. Plaintiff makes the statement (brief, p. 47) that the Republic of Texas "does not appear to have made any claim to *ownership* of the marginal sea," and supports this by arguing that (a) the Republic did not administer these lands as a part of "public lands"; (b) the Land Office was organized on a county basis, and the coastal counties stop at the Gulf shore; and (c) the judicial districts included the counties, omitting provision for the marginal sea. (Plaintiff's brief, pp. 47, 48.) Defendant's proof will show that the Act of 1837, the first providing a comprehensive system for administering the public lands *then* made subject to sale, did not include lands under *any* navigable waters. No provision was made for sale of any of the Republic's lands under bays, marshes, salt water lakes, *or any navigable streams*. Under this deliberate policy, not only did coastal surveys stop at the shoreline, but all internal surveys stopped at the banks of navigable streams. The very same statute also provided:

"All lands surveyed for individuals lying on navigable water courses shall front one-half of the square on the water course. . . ."

and further, that streams defined as navigable "shall not be crossed by the lines of any survey." 2

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<sup>2</sup> 2 Laws, Republic of Texas, p. 62; 1 Gammel's Laws of Texas 1404.

Laws, Republic of Texas, p. 62; Sec. 21, p. 70; Sec. 42, p. 76; 1 Gammel's Laws of Texas 1404, 1412, 1418.

These provisions have remained in force throughout the history of the Republic and the State. Art. 5302, R. S. 1925 (present statute). There has been no departure from the public policy reserving and excluding from sale lands underlying navigable waters, although sales have been made by direct legislative grant for public improvements.

By the Act of April 9, 1913, the State made provision for mineral development and the lease of mineral rights in public lands including, among others, fresh water lakes, islands, bays, marshes, reefs and salt water lakes. Gen. Laws, 33rd Leg. (1913), p. 409. But the Act made no provision for developing the beds of navigable rivers. Nor had such provision ever been made until the 1913 Act was amended by the Act of March 16, 1917, which added river beds and channels. Gen. Laws, 35th Leg. (1917), p. 158.

In 1919, the 1917 Act as to the development of islands, salt water lakes, bays, inlets, marshes and reefs owned by the State within tidewater limits, was supplemented by including provision for the development of "that portion of the Gulf of Mexico within the jurisdiction of Texas." Gen. Laws, 36th Leg., 2nd C. S. (1919), p. 61.

Properly understood, that is, when viewed against the background of the evidence which defendant will present on the merits, the administration of the public land system by the Republic of Texas furnishes no support for the contention that Texas failed to claim the lands within its boundaries, including those underlying the Gulf, but will fully support

Turn to Card No. 1803 for Chart appearing  
at This Spot.



such claim in the same manner that other nations were asserting and maintaining their ownership to similar lands. The circumstances that the Republic of Texas elected to withhold from general sale its lands under navigable waters and its minerals in such lands is no evidence of disclaimer of the lands or the minerals. It is no more probative of a disclaimer or absence of claim of ownership than was inaction by Congress as to the submerged lands off California in the *California* case.<sup>67</sup>

The failure to subdivide the marginal belt into counties is not significant.<sup>68</sup> It is hardly to be supposed that without mentioning the boundaries of the Republic of Texas, and without referring to the Act of December 19, 1836, defining the boundaries of the Republic, the Texas Congress intended to amend that Act, or to surrender or abandon any of its territory. As a matter of fact, as shown by the 1837 map of the county boundaries of the Republic (opposite this page) less than half the State was divided into coun-

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<sup>67</sup> Brief of the United States in Support of the Motion of Judgment, *United States v. California*, No. 12, Original, October Term, 1946, pp. 185, 186.

<sup>68</sup> The common law on this subject was stated by Lord Hale, Chief Justice of England, in *De Jure Maris* as follows:

"The narrow sea, adjoining to the coast of England, is part of the waste and demesne and deminions of the king of England, whether it lie within the body of any county or not." Hargrave's *Law Tracts* (Dublin, 1787), p. 10.

The contention of plaintiff was also refuted in *Manchester v. Massachusetts*, 139 U.S. 240; 263-264 (1891) wherein one of the parties contended "that the jurisdiction of a State as between it and the United States must be confined to the body of the counties."

ties, and county lines did not cross inland or coastal bays. It had as well be argued that the Republic did not claim the vast expanse of West Texas, part of which was later purchased by the United States under the compromise of 1850, or that it claimed no ownership of the beds and subsoil of the coastal inland water bays which were not included within county boundaries.

Neither is there merit to plaintiff's point (plaintiff's brief, p. 48) that judicial districts of the Republic of Texas consisted of named counties, without embracing, in terms, the area in the Gulf. As we understand it, the plaintiff does not contend that the marginal belt is not within the boundaries of Texas. We further understand that the plaintiff contends that the marginal belt is within the United States. The United States Court for the Southern District of Texas is comprised of named counties. Title 28, U. S. Code, Sec. 124 (b). It will hardly be conceded by plaintiff that by so limiting the district the Congress intended to disclaim the marginal belt within the district. In so describing judicial districts the Congress of the United States did not intend, and the Congress of Texas did not intend, to affect national boundaries or to delimit national territory. Cf. *United States v. Texas*, 162 U.S. 1 (1896).

Many maps, letters, and other evidence to be offered by the defendant will show conclusively that the Republic of Texas did claim ownership in the seabed, subsoil, and minerals within its boundaries, including those in controversy, and that there is no foundation for plaintiff's factual conclusion to the contrary.

THREE-LEAGUE SEAWARD BOUNDARY WAS REASONABLE,  
ACCEPTED BY OTHER NATIONS, AND  
MAINTAINED BY THE TEXAS NAVY

Although the United States says that "no question is here raised as to the *boundary* of Texas." (italics theirs), plaintiff's brief does question the effect (pp. 7, 52), maturity (pp. 14, 15), recognition (pp. 45, 47) and control over (p. 54) the three-league boundary of Texas. It is for this reason that we discuss this boundary of the Republic of Texas and, as shown later, of its successor, the State of Texas.

An examination of the international law chart will reveal the error of plaintiff's factual conclusion that the concept of a territorial or maritime belt was not generally accepted in 1845. All the authorities prior to 1845, beginning with Lord Hale in 1670 and ending with Sala in 1845, recognized a portion of the adjacent sea as being properly within the territory of a littoral nation. In 1758 Vattel wrote:

"These parts of the sea are within the jurisdiction of the nation, and a part of its territory."

<sup>66</sup> Brief for the United States, p. 7, note 3.

<sup>67</sup> Appendix, p. 18.

<sup>68</sup> Vattel, *Le droit des gens* (Leyden, 1758), Bk. 1, § 295, p. 130. Vattel was the accepted and most quoted authority on international law in the United States during the first 100 years of its history. For example, an examination of the Congressional Debates for the years 1789 to 1845 shows that Vattel was cited, quoted, or referred to as an authority on international law 91 times as compared with the next most frequently cited authority, von Martens, who was cited 24 times. The following tabulation is illuminating:

Vattel	91
von Martens	24
Grotius	17
Pufendorf	9
Barlemaqui	6
Bynkershoek	5

This concept of a territorial belt belonging to a littoral nation was also recognized by Molloy (1676), Pufendorf (1688), van Bynkershoek (1702), Moser (1750), Surland (1750), Hübner (1759), Valin (1760), Lampredi (1776), Tozé (1780), Galiani (1782), Günther (1787), von Martens (1789), Nau (1802), Boucher (1803), Rayneval (1803), Azuni (1805), Jouffroy (1806), Schultes (1811), Schmaltz (1817), Schmelzing (1818), Klüber (1819), Holroyd (1821), Angell (1826), Lord Wynford (1829), Hall (1830), Woolrych (1830), Bello (1832), Saalfeld (1833), Wheaton (1836), Lucchesi-Palli (1840), Heffter (1844), and Massé (1844).

During the entire period the writers, American, English, German, Dutch, Swiss, Danish, French, Italian, Prussian, Mexican, and Venezuelan, were in agreement. We have found none to the contrary. There is not the slightest authority for plaintiff's contention that "In 1845, the conception of a maritime belt was very immature, and it did not achieve general recognition and formulation until later in the 19th century." <sup>1</sup> (Plaintiff's brief, p. 14.)

True, there was not then and is not now any maximum limit of the belt which may be incorporated within a nation's territory. The test was based upon reasonableness for the needs of the particular State

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<sup>1</sup> See quotations from them in *Opinions of Jurists and Publicists*, Appendix, pp. 18-25.

It is significant that the United States took the contrary and correct view in its brief in *U. S. v. California*, p. 59, and its oral argument, Reporter's Transcript, pp. 26-27, when it recognized Mexican dominion over the California belt prior to ~~1845~~ and claimed that the United States obtained the property from Mexico in that year.

and its power to maintain its jurisdiction in the belt, the same as over land territory.

An examination of the writings of the publicists prior to 1845 also reveals that the distance of three leagues chosen by Texas as its seaward boundary was a reasonable limit. In this connection, Vattel said:

"The dominion of the state over the neighbouring sea extends as far as her safety renders it necessary and her power is able to assert it."

Georg Friedrich von Martens wrote a Latin treatise in 1785 on the law of nations, later publishing a new work in French in 1789 and a German edition in 1796. His work was highly esteemed and progressed through many editions in both French and German. The French edition was translated into English by William Cobbett in 1795 and published in Philadelphia. As the translator stated in the second edition, the prior edition was subscribed for by all members of Congress. In that translation the following is found:

"A custom, generally acknowledged, extends the authority of the possessor of the coast to a cannon shot from the shore: that is to say, *three leagues* from the shore, and this distance is

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<sup>1</sup> The most exhaustive treatise and accepted authority on the subject of extent of rights in marginal belts is Stefan A. Riisenfeld's *Protection of Coastal Fisheries Under International Law* (Washington, 1942). See Chapters I and II and Conclusion, p. 277.

<sup>2</sup> Vattel, *op. cit. supra*, note 71, § 289, p. 128.



the least, that a nation ought now to claim, as the extent of its dominions of the seas."

As said by Riesenfeld in his *Protection of Coastal Fisheries Under International Law*, pp. 26-27, "Martens even admitted that a nation may occupy, and extend its dominion, beyond the distance mentioned in the last section [three leagues] . . . and such dominion may, if national security requires it, be maintained by a fleet of armed vessels.' In consequence, he proceeded to an investigation as to whether and where such claims in Europe had been made and acceded to. 'Within the distance of three leagues,' he recognized the exclusive rights of the coastal state to all sea products." He, like all

<sup>70</sup> Von Martens, *Summary of the Law of Nations* (translation by Cobbett) 160. Von Martens is sometimes listed mistakenly as an advocate of the three-mile rule. Riesenfeld, in *Protection of Coastal Fisheries Under International Law* (1942) 27, discusses this question and, in the light of Martens' statements in later editions, proves that Martens meant three leagues. That this is correct is shown by the following footnote (translated) from Martens' German edition of 1796, *Enleitung in das positive Europäische Völkerrecht*, p. 46:

"Pfeffel in *Principes du droit naturel*, bk. 3, chap. iv, sec. 15, indicates the distance of three leagues as the now universal principle. This principle is now incorporated in many treaties, even though no cannon reaches that far, especially over the sea."

<sup>71</sup> Riesenfeld says of Martens: "It is probably no exaggeration to state that G. F. von Martens gave the theory of international law a new direction. He was the great model of all continental writers in the century which followed the appearance of the first French and German edition of his work. Rivier calls him in his well-known *Esquisse d'une histoire littéraire des gens depuis Grofius jusqu'à nos jours*, the true originator of the systematic and scientific study of the positive law of nations." (p. 29).

other publicists of the 1679-1845 period and practically all since then, said the littoral state acquired both "empire" and "property" in that part of the sea brought within its territory.

The reasonableness of this limit chosen by the Republic of Texas is shown also by the following statements of other publicists of this period:

*Schmalz*: "It is said that the sea must belong to the land as far as it can be defended from land, and that this extends as far as a shot from a cannon on the shore may reach; but this has since been fixed rather arbitrarily at three leagues."

*Kent*: "It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories. . . . All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea, extends as far as is requisite for his safety, and for some lawful end."

*Bynkershoek*: "The possession of a maritime belt ought to be regarded as extending just as far as it can be held in subjection to the mainland. . . ."

<sup>76</sup> Opinions of Jurists and Publicists, Appendix, p. 21.

<sup>77</sup> Schmalz, *Das Europäische Völker-Recht* (Berlin, 1817) 141.

<sup>78</sup> Kent, *Commentaries on American Law* (New York, 1826) 29.

<sup>79</sup> Bynkershoek, *De Dominio Maris* (tr. Magoffin, 1844 ed.) 14, in *11 Classics of International Law* (New York, 1923).

Günther: "Every nation is allowed by nature to take in possession a part of the sea as well as of the land, as much, namely, as its preservation and perfection demand."

Rayneval: "We might add that the bottom of the sea, along the coasts, can be considered as having been part of the continent, and that it is therefore considered as still forming part of it. But the extent of this ownership is not determined by a uniform rule: some carry it out to thirty leagues, *others only to three*; others fix it at the range of cannon placed on the seashore. Along the southern coast of France, the distance was ten leagues to the Barbary States."

The State can present evidence which will show that members of the Congress of the Republic of Texas and other officials who had a part in the drafting or the adoption of the boundary act of December 19, 1836, had available to them many of the international law books of the period, particularly the writings of Martens and Vattel, which were most generally used in the United States. The State can also present evidence which will show that the person who was responsible for the drafting of the 1836 act declaring the boundaries of the Republic of Texas went first to the writings of the international law publicists to guide him in the drafting of this declaration.

II Günther. *Europäisches Völkerrecht* (Altenburg, 1787) 49.

Rayneval, *Institutions du droit de la nature et des gens* (Paris, 1803) 161.

The above statement shows, and the writings of other publicists and other evidence which Texas can present will even more conclusively show, that the three-league boundary of the Republic of Texas was a reasonable boundary in international law at the time of its establishment and that subsequent development of international law concerning the proper limit of a nation's territorial belt has not in any way altered the reasonableness and validity of this boundary.

The State's evidence also will show that the limit of three leagues was a reasonable distance in the Gulf of Mexico off the coast of the Republic of Texas because of the unusually shallow depth of the water in that area. This is important because of the view of some of the early publicists that the shallowness of the adjacent waters should be considered in determining the proper seaward limits of a littoral nation.

With knowledge of the boundaries declared and claimed by the Republic of Texas, the United States, France, Great Britain, and The Netherlands formally recognized the Republic as a sovereign nation.

The State is prepared to prove that due to the shallowness of this water the sailing routes off the coast of Texas for larger craft were not within three leagues. See average present depths shown on cross-section map opposite p. 4, *supra*.

See Valin, *Nouveau commentaire sur l'ordonnance de la marine du mois d'août 1681* (1760) 638: "Others, finally, have taken for the rule the extent of sea which can be seen from the shore; but this measure being uncertain by its nature, it would have been better, perhaps, to reckon the domain over the adjacent sea by the sounding-lead, and to assign its limits exactly, at that point where the lead ceased to fetch bottom; so that, outside soundings, the sea would have been recognized as free for navigation and fishing, as being incapable of belonging to any one's domain."

The United States was the first officially to recognize the independence of the Republic of Texas. On December 22, 1836, President Jackson presented to Congress a special message, indicating in the following language that a recognition of Texas' independence would be a recognition of its territorial claims:

"The title of Texas to the territory she claims is identified with her independence. . . ."

Subsequently, in the same session of Congress, the United States Senate, on March 1, 1837, adopted a resolution recognizing the independence of Texas.<sup>80</sup> (*Supra*, p. 54.)

This resolution was offered by Senator Walker of Mississippi. During the final debate on the resolution immediately prior to its adoption, Senator Walker acquainted the Senate with the boundaries of Texas by reading on the floor of the Senate the boundary act of December 19, 1836.<sup>81</sup>

<sup>80</sup> Cong. Globe, 24th Cong., 2nd Sess. 45.

<sup>81</sup> Cong. Globe, 24th Cong., 2nd Sess. 270.

<sup>82</sup> In a speech in a secret session of the Senate on the treaty for the annexation of Texas to the United States, on May 21, 1844, Mr. Walker refers to the resolution adopted on March 2, 1837, saying: "As the author of the resolution, before it was adopted, I read to the Senate the boundaries of Texas, as described in her organic law, claiming it also as the ancient boundaries of Louisiana; and, with the full knowledge of these facts, the resolution was adopted. In our subsequent treaties, and those of Great Britain, France, and Holland, she is described as 'the republic of Texas' and her independence fully recognized. If, then, as contended by the senator from Missouri, the mere name (the republic of Texas) in a treaty adopts the boundaries described in her organic law, not only have we recognized the Del Norte as the rightful boundary of Texas, but also have Great Britain, France, and Holland." (Appendix to the Cong. Globe, 28th Cong. 1st Sess. 549.)



At the appropriate time, Texas will present other evidence to show that the United States recognized the boundaries of the Republic of Texas when it recognized the independence of the Republic, and that these boundaries were also known to and accepted without objection by other nations prior to recognition and treaties of commerce and amity.<sup>89</sup>

On September 25, 1839, a treaty of amity, commerce and navigation was concluded between the Republic of Texas and France.<sup>90</sup> The preamble contained the following:

"The President of the Republic of Texas, and his Majesty the King of the French, . . . have resolved to conclude a Treaty of Amity, Navigation and Commerce, . . . which shall establish the formal recognition on the part of France, of the Independence of the Republic of Texas.  
"

Article 2 began:

"The French and Texians shall enjoy, in their persons and property, in the entire extent of their respective territories, the same rights, privileges, and exemptions, which are or may be granted to the most favored nation. . . ."

<sup>89</sup> It was agreed by the United and the Republic of Texas that the Treaty of Amity, Commerce and Navigation of April 5, 1831, between the United States and Mexico would continue between the United States and Texas, "subject to termination by either party on one year's notice from and after April 15, 1840." Dept. State 1 Communications from Agents of Texas; see, also, 1 Instructions, Texas, 31-33, June 14, 1841.

<sup>90</sup> Laws 1841, Rep. of Texas, 5th Cong., Appendix, p. 1; 2 Gammel's Laws of Texas 655.

On September 18, 1840, a treaty of amity, commerce and navigation between the Republic of Texas and The Netherlands was concluded.<sup>91</sup>

On November 13, 1840, a treaty of commerce and navigation was concluded between the Republic of Texas and Great Britain.<sup>92</sup> In a proposed draft of a convention submitted to the Queen's Advocate for opinion by the direction of Viscount Palmerston on November 13, 1840, whereby Great Britain would act as a mediator between Texas and Mexico, the boundaries declared by the Republic were set out.<sup>93</sup> A third treaty concluded between the Republic of Texas and Great Britain was one providing for the suppression of the African slave trade.<sup>94</sup>

A further fact showing that the recognition of the independence of the Republic of Texas was a recognition of its declared boundaries is that there was no protest by the United States or any other nation against the boundaries proclaimed and maintained by the Republic of Texas.

The unconditional recognition of the independence of the Republic of Texas by the United States and

<sup>91</sup> Laws, 1843, Rep. of Texas, 7th Cong., xxvi; 2 Gammel's Laws of Texas 905.

<sup>92</sup> Laws, 1843, Rep. of Texas, 7th Cong., i; 2 Gammel's Laws of Texas 880. Article 4 of this treaty admits reservation by Texas of coastal trade.

<sup>93</sup> Foreign Office, General Correspondence, Texas (F. O. 75). Vol. I, Sept.-Dec., 1840, pp. 108-111. Article 3 provided: "That her Britannick Majesty in order to give all possible rapidity and effect to the stipulations and agreement of the Republic of Texas hereby recognizes her Independence and Sovereignty and engages to employ her good offices with the Republic of Mexico to procure her concurrence in the benign and pacific objects of this Convention."

<sup>94</sup> Laws, 1843, Rep. of Texas, 7th Cong. x; 2 Gammel's Laws of Texas 889.

other major nations of the world had the retroactive effect of validating, along with other laws of the Republic, the boundary act setting the Gulfward boundary of the Republic "three leagues from land." This general principle was recognized and applied in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302-303 (1918), wherein it was said:

"It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence."

This principle was recognized in *Ricaud v. American Metal Company*, 246 U.S. 304, 308-309 (1918), the Court saying:

"... the revolution inaugurated by General Carranza against General Huerta proved successful, and the government established by him has been recognized by the political department of our government as the *de facto* and later as the *de jure* government of Mexico, which decision binds the judges as well as all other officers and citizens of the government. [Citations.] This recognition is retroactive in effect and validates all the actions of the Carranza government from the commencement of its existence. [Citations.]

"It is settled... that the courts of one independent government will not sit in judgment



# T E X A S

Follow p. 4

Austin

Houston

Caples Field

High Island Field

Oilpool (1543-1902)

Sabine River

Ft. San Jacinto

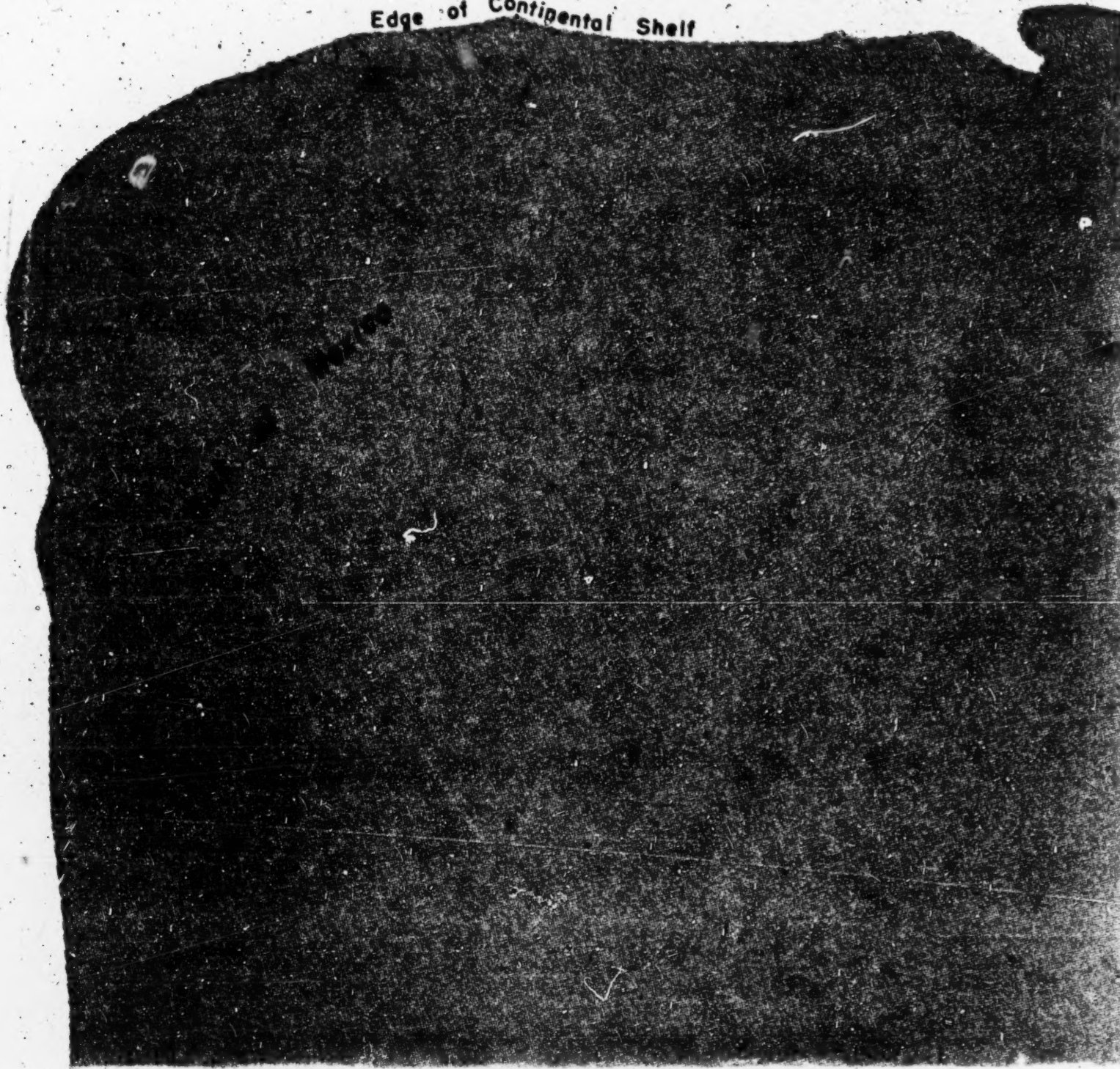
Bohivar Jetty

Galveston Jetty

Corpus Christi

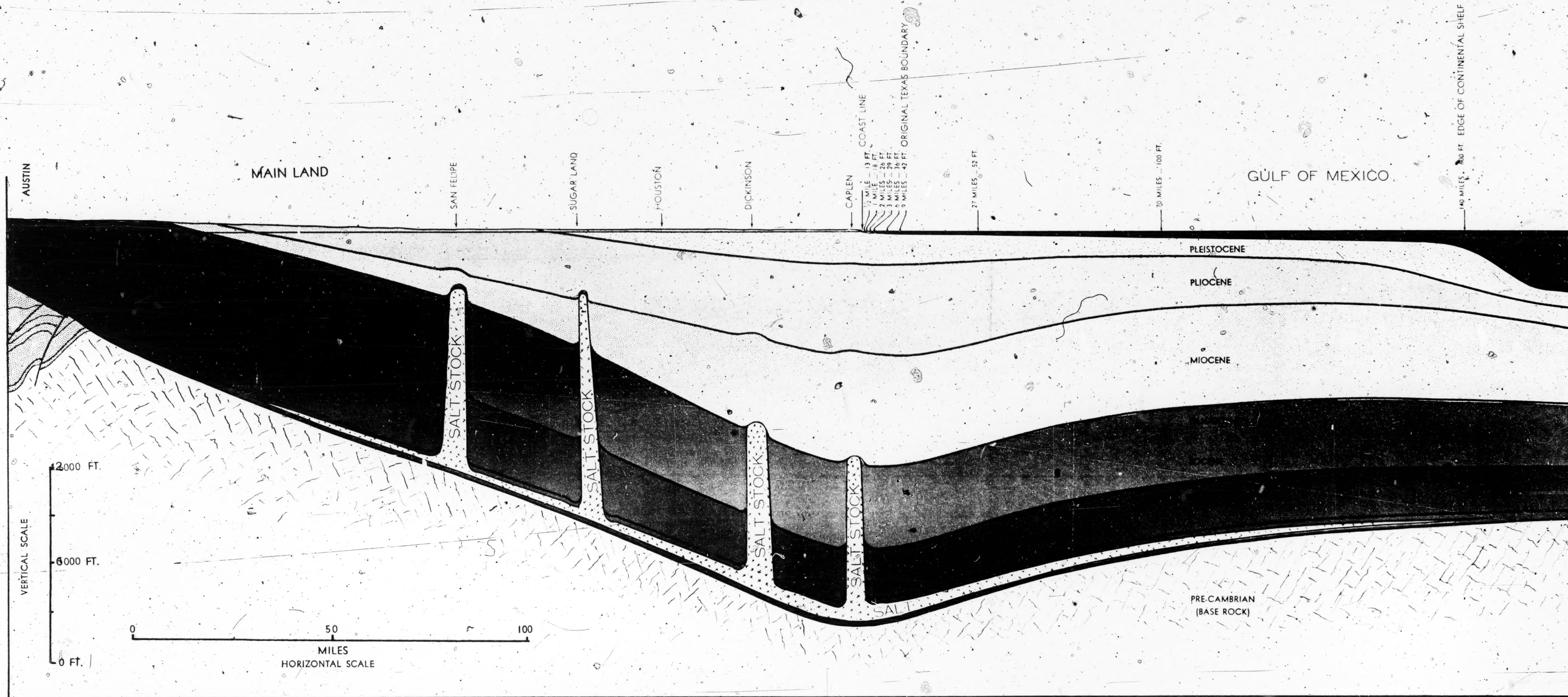
Edge of Continental Shelf

Brownsville





(Follow p. 4)



PROFILE SECTION OF TEXAS MAINLAND AND CONTINENTAL SHELF

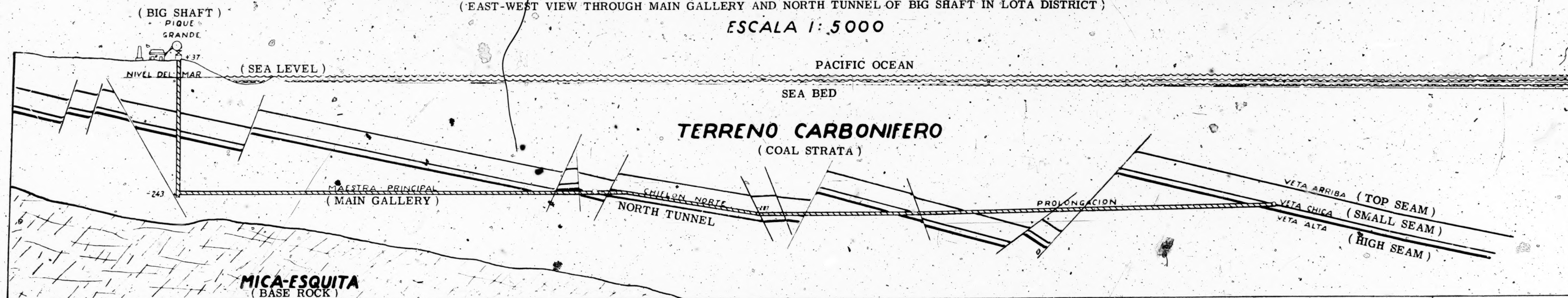


(Follow Page 4)

# CORTE ESTE-OESTE POR MAESTRA PRINCIPAL Y CHIFLON NORTE DEL PIQUE GRANDE DEL ESTABLECIMIENTO DE LOTA

(EAST-WEST VIEW THROUGH MAIN GALLERY AND NORTH TUNNEL OF BIG SHAFT IN LOTA DISTRICT)

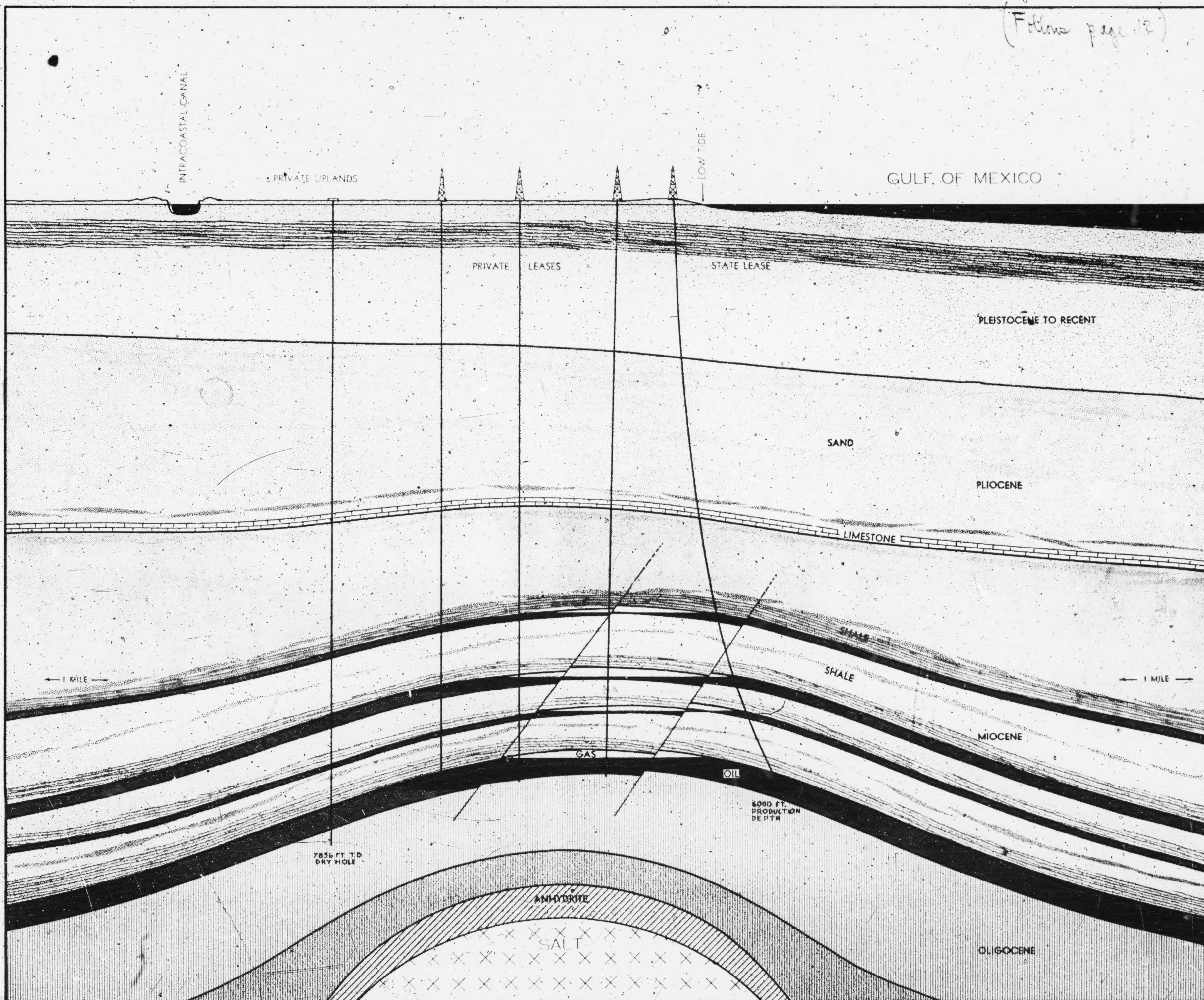
ESCALA 1:5000



Submarine coal mine running four miles from shore underneath the Pacific Ocean, Lota, Chile.

Operations began 1852.

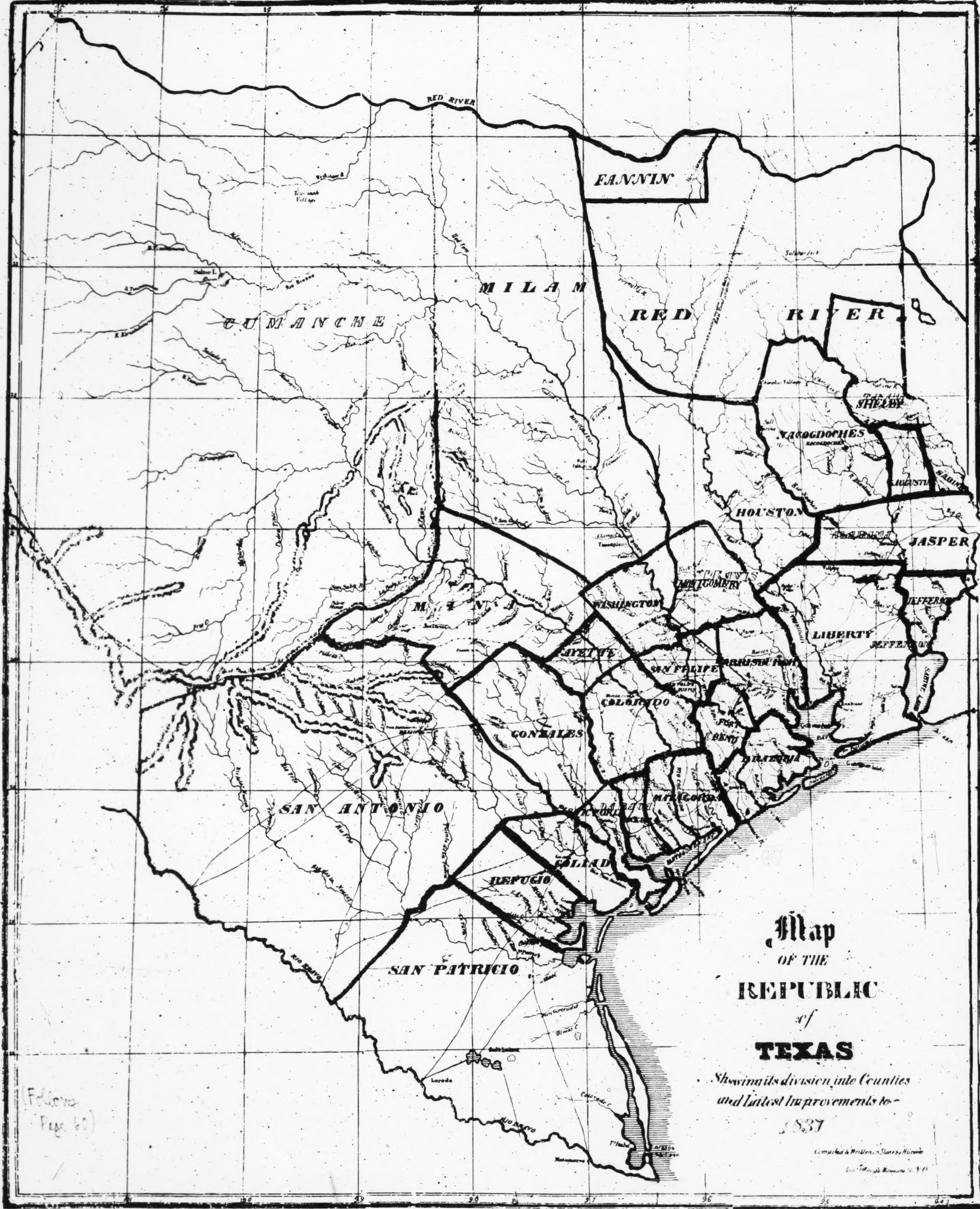




DIAGRAMMATIC CROSS SECTION OF CAPLEN FIELD, TEXAS

SHOWING MINERAL PRODUCTION UNDER BOTH UPLANDS AND GULF





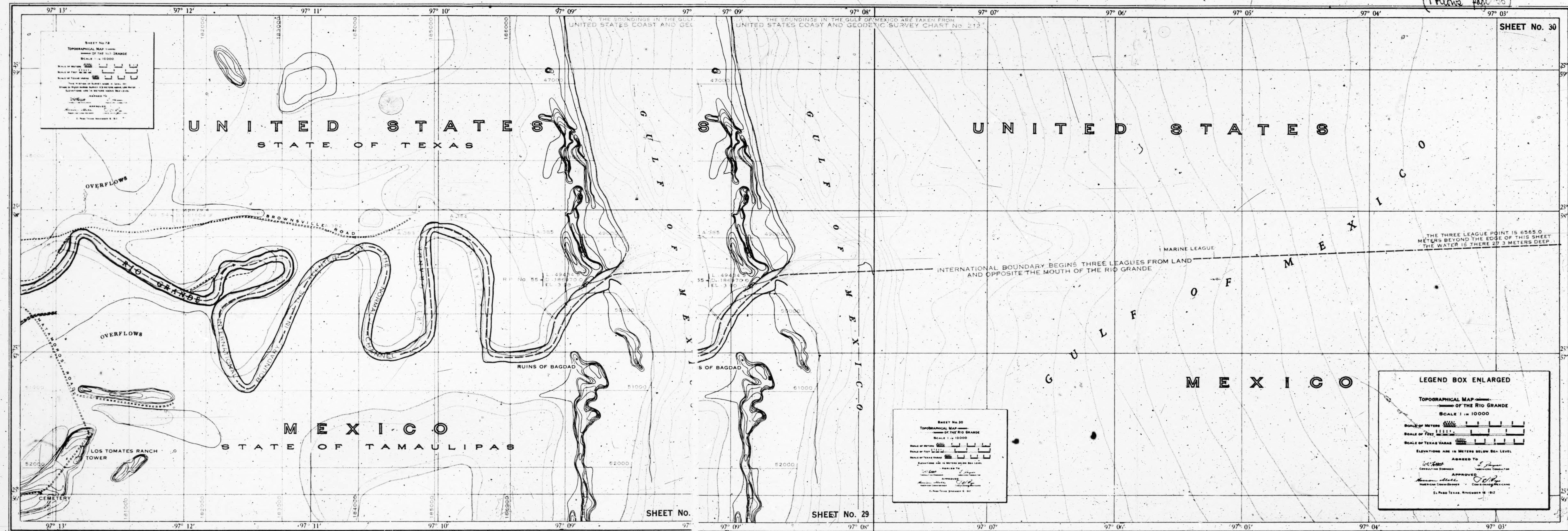
Map  
OF THE  
REPUBLIC  
of  
TEXAS

Showing its division into Counties  
and latest improvements to  
1837

Compiled & Published by H. H. Henshaw  
New York, 1837

Follows  
Page 60





# REDUCED SCALE REPRODUCTED SCALE REPRODUCTION OF MAP SHEETS 29 AND 30 OF

"Department of State—PROCEEDING-ment of State—PROCEEDINGS OF THE INTERNATIONAL BOUNDARY COMMISSION, UNITED STATES AND MEXICO—Joint Report of the Consulting Engineers on Field Operations of 1910-1911. American Section" (Department of State, 1913).



on the validity of the acts of another, done within its own territory. [Citations.] This last rule . . . requires that when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned, but must be accepted by our courts as a rule for their decision. . . . <sup>95</sup>

Plaintiff argues that the recognition by the Republic of Texas, in its Convention of 1838 with the United States, of the binding effect of the treaties of 1819 and 1829 created a conflict between the boundaries set forth in those treaties and the three-league boundary declared by the Republic in 1836.<sup>96</sup> When all the facts concerning this Convention are examined, it will be apparent that no such "conflict" exists.

It is clear from the proceedings of the Convention that it concerned only a *portion* of the mainland boundary and only *that portion* of the boundary between the United States and Texas was to be marked. In the second *whereas* clause in the Preamble, it was declared to be proper and expedient

"that a *portion* of the same [the boundary] should be run and marked without unnecessary delay."

<sup>95</sup> Other cases recognizing this principle are: *United States v. Belmont*, 301 U. S. 324 (1937); *Underhill v. Hernandez*, 168 U. S. 250 (1897); *Williams v. Bruffy*, 96 U. S. 176 (1878); *United States v. Pink*, 315 U. S. 203 (1942); *Chemacid, S. A. v. Ferrotar Corporation*, 51 F. Supp. 756 (S.D.N.Y. 1943); *Aksionairnoye Obschestvo v. James Sagor & Co.*, 3 K.B. 532, 11 B.R.C. 666 (1921).

<sup>96</sup> Brief for the United States, pp. 49-52.



Article I of the Treaty says:

“that *portion* of the said boundary which extends from the mouth of the Sabine. . .”

Article II says that each party

“shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised,”

and

“the remaining portion of the said boundary line shall be run and marked hereafter.”

Until such time each party was to

“exercise without the interference of the other within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has heretofore usually exercised.”

This, with full knowledge of Texas' coastal three-league boundary, was another act of recognition of the “territory of which the boundary shall not have been so marked and run.” The fact that the two nations ran only that portion of their common boundary from the mouth of the Sabine north should not be taken as a disclaimer on the part of either nation to its marginal belt boundary in the Gulf south of the mouth of the Sabine.

That only a portion of the boundary between the United States and the Republic of Texas was in-

tended to be, and was, marked by the boundary commission is made clear by the following statement from 4 Miller, *Treaties and Other International Acts of the United States of America* (G.P.O. 1934) 141:

"The boundary between the United States and the Republic of Texas was only a part of the line first fixed by the treaty of 1819 with Spain and later adopted as the boundary between the United States and Mexico by the Treaty of Limits of 1828; and it is to be particularly observed, moreover, that this convention provided for the immediate demarcation of only a portion of the boundary between the United States and the Republic of Texas, namely, that 'which extends from the mouth of the Sabine, where that river enters the Gulph of Mexico to the Red River,' a distance of less than 300 miles."<sup>98</sup>

That the United States and the Republic of Texas were concerned only with that portion of the boundary described for demarcation in the convention and that there was no intention to disclaim or abandon any other portion of the boundary between them is clearly shown by the following instructions to the Texas boundary commissioner, Memucan Hunt, by the Secretary of State of Texas, R. A. Irion, on March 21, 1838:

"The present boundaries of Texas as fixed by an act of Congress are as follows, viz,—begin-

<sup>98</sup> That the boundary traced in this Convention was chiefly a land boundary is not unusual. Instances are rare in which two adjacent littoral nations have specifically surveyed and marked the water boundaries between their adjacent marginal seas. The surveys of the United States-Mexican boundary (see chart, pp. 88-89) thus take on added significance because they are exceptional.

ning at the mouth of the Sabine River and running west in the Gulph of Mexico three leagues from land to the mouth of the Rio Grande; thence up the principal branch of said river to its source, then north to the forty-second degree of north latitude; thence along the boundary line as defined in the treaty between the United States and Spain to the beginning."<sup>99</sup>

The United States, in treating with the representatives of the Republic of Texas in 1838, at no time suggested any conflict between the three-league sea boundary of the Republic and the treaties of 1819 and 1828, nor did it in any way question this boundary.

From 1836 to 1845, the Republic of Texas exercised its jurisdiction and control over that portion of the Gulf of Mexico within its boundaries three leagues from shore. An example of this was the passage of acts establishing courts of admiralty and providing for a coastal patrol for protection and collection of revenues to be derived from the area.

During this period, the Navy of Texas patrolled and defended the waters of the Gulf of Mexico within the three-league boundary. In 1836, the Texas Navy captured two American vessels and one British vessel engaged in carrying of contraband and cargo. By 1840, the Texas Navy had gained command of the whole Gulf,<sup>100</sup> and retained this control until its

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<sup>99</sup> I Garrison 319.

<sup>100</sup> Richard Parkenham, British minister to Mexico, in a letter to Lord Palmerston, British Secretary of State for Foreign Affairs, said: "There is actually a Texian squadron cruising on the coast, which may at any moment commence offensive operations, and the Mexican Government possesses

annexation to the United States. Other evidence can and will be offered to show that there is no foundation in fact for plaintiff's assertion that "the Republic did not have control over the marginal sea." (Plaintiff's brief, p. 54.)

That the boundaries declared by the Republic of Texas in 1836 were the boundaries of the Republic at the time of annexation and were again recognized is shown by many statements made during the negotiations and after annexation had been accomplished. In a speech by Senator Benton of Missouri, May 16, 18, and 20, 1844, during the negotiations on the unratified treaty, he said:

"The Republic of Texas acts by its name, and passes itself to us in the whole extent of all the limits and boundaries which it asserts to be its own. . . .

" . . . The boundary is fixed, as much so as the most elaborate specification could make it. A law of the Texian Congress fixes the boundaries. It defines the boundaries of the Republic of Texas. . . . the fact is, the whole passes, with the precise boundaries named in the law. . . ."

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not a vessel of the smallest description, not even a boat, to oppose them." Adams, *British Interests and Activities in Texas, 1838-1846* (Baltimore, 1910) 47.

"The squadron of Texas dominates our gulf coast from the boundary of the U. S. to Cape Catoche in Yucatan" *Diario del Gobierno* (Mexico City) for October 4, 1840.

"Texas has now a Navy that commands the whole Gulf, and Mexico dares not set a single armed vessel afloat beyond the limits of her own harbor." Moore, *Map and Description of Texas* (New York, 1840) 40.

<sup>1</sup> Appendix to the Cong. Globe, 28th Cong., 1st Sess. 475.

On June 24, 1844, Mr. Breese of Illinois delivered a speech in the United States Senate in which he said that

“ . . . we have acknowledged the limits as defined in the act of the Texian Congress of 1836. . . . And why do I say so? Because we did, in 1837, with a full knowledge of these declared boundaries, acknowledge the independence of Texas as a state, with that act of her Congress then, and as now, in full force. . . . ”<sup>2</sup>

Mr. Bowlin, of Missouri, in a speech before the House on January 15, 1845, said that if Texas “is a free, sovereign, and an independent power, no one can question her authority over and within the limits of her domains.”<sup>3</sup>

In a speech in the House, on January 24, 1845, Mr. Haralson, of Georgia, made the following statement:

“The Texian act of Congress, approved December 19, 1836, I have little doubt, defines correctly the boundary of that Republic.”<sup>4</sup>

All of the diplomatic representatives of the Republic of Texas were instructed that the boundaries of the Republic were those declared in the act of December 19, 1836, and that in the negotiations of treaties with other countries these boundaries were to be maintained and recognized. We have letters and diaries which will show this to be true.

<sup>2</sup> *Id.* at 540.

<sup>3</sup> Appendix to Cong. Globe, 28th Cong., 2d Sess. 94.

<sup>4</sup> *Id.* at 195.



Above all things, it was understood during the proceedings leading up to annexation that the boundaries asserted by Texas, and its consequent ownership of the unsold lands and minerals therein, were to be recognized and defended by the United States. There is a vast amount of evidence in the form of diplomatic correspondence, personal letters, diaries, and newspaper accounts which will substantiate this. An example is a letter from President Polk, dated June 15, 1845, to Andrew Donelson, U. S. chargé d'affaires, who was negotiating the agreement. In reply to Donelson's report that there was insistence on the defense of Texas' original boundaries, President Polk said:

"Of course, I would maintain the Texian title to the extent which she claims it to be. . . ."

This and like evidence will demonstrate that plaintiff makes an incorrect factual conclusion when it contends that the United States did not recognize the 1836 boundaries as "rightful" and "proper." (Plaintiff's brief, pp. 15, 52.)

The joint resolution for annexing Texas was passed by the Congress of the United States on March 1, 1845, providing

"That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new state, to be called the State of Texas:

" . . . and [said State] shall also retain all the vacant and unappropriated lands lying *within its limits*. . . ."

Thereupon a joint resolution by the Congress of Texas of June 23, 1845, consented to the incorporation, using the words "people and territory" of the Republic of Texas." The annexation was completed after the Constitution for the new State was submitted and approved as "in conformity to the provisions of said joint resolution" of annexation by the United States Congress on December 29, 1845. (Appendix pp. 58-64.) This Constitution adopted by Texas "in accordance with the provisions of the joint resolution for annexing Texas to the United States" and so approved by the Congress of the United States, contained the following provisions:

"The rights of property and of action which have been acquired under the Constitution and laws of the Republic of Texas, shall not be divested; . . . but the same shall remain precisely in the situation which they were before the adoption of this Constitution." (Article VII, Section 20.)<sup>5</sup>

"All laws and parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the joint resolutions for annexing Texas to the United States, or to the provisions of this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof." (Article XIII, Section 2.)<sup>6</sup>

The latter provision continued in effect the boundary act of December 19, 1836.

<sup>5</sup> 2 Gammel's Laws of Texas 1293-94.

<sup>6</sup> *Id.* at 1299.

This principle as a matter of law was recognized in *New Mexico v. Texas*, 276 U.S. 557 (on reh'g 1928), where this Court said:

"New Mexico, when admitted as a State in 1912, explicitly declared in its Constitution that its boundary ran 'along said thirty-second parallel to the Rio Grande. . . . ' This was confirmed by the United States by admitting New Mexico as a State with the line thus described as its boundary. . . . "

That this was the intention of the parties is confirmed also by the subsequent construction of the annexation agreement by both parties.

### *Subsequent Construction*

After Texas had officially become a member of the United States, the legislature promptly reaffirmed, on April 29, 1846, the State's "exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas. . . . "

<sup>1</sup> *Accord: New Mexico v. Colorado*, 267 U.S. 30, 41 (1925); and *Pope v. Blanton*, 10 F. Supp. 18 (D.C. Fla. 1935), mod. 299 U.S. 521 (1935).

<sup>2</sup> The entire Act read as follows:

"JOINT RESOLUTION Declaring the exclusive right of the State of Texas to the jurisdiction over the soil included within the limits thereof.

"Section 1. Be it resolved by the Legislature of the State of Texas, That the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of the said Republic, that such exclusive right is now vested in and belongs to the State, excepting such jurisdiction as is vested in the United States, by the consti-

During the war with Mexico of 1846-48, the government of the United States repeatedly recognized Texas' boundary as established by its Congress in 1836. In fact, the war came about because Mexico disputed Texas' western boundary on the Rio Grande, which together with the three-league line from its mouth into the Gulf, also formed a portion of Texas' southwestern boundary. President Polk had promised Texas prior to annexation that he "would maintain the Texian title to the extent which she claims it to be, and not permit an invading enemy to occupy a foot of the soil East of the Rio Grande. . . ."

In a speech on the boundary of Texas Sam Houston, Texas liberator, president, and then United States Senator, said:

"There is no question what is the boundary; for it was defined, asserted and maintained before the annexation was made; and it has never

tution of the United States, and by the joint resolution of annexation, subject to such regulations and control as the government thereof may deem expedient to adopt; that we recognize no title in the Indian tribes, resident within the limits of the State to any portion of the soil thereof, and that we recognize no right in the government of the United States to make any treaty of limits with the said Indian tribes, without the consent of the government of this State.

"Sec. 2. Be it further resolved, That his excellency the Governor, be requested to communicate this resolution to the government of the United States, and to our senators and representatives in congress.

"Approved, 29th April, A. D. 1846." Acts 1846, 1st Leg., 155; 2 Gammel's Laws of Texas 1461.

\* The Papers of President James K. Polk, vol. 72, p. 6767, Library of Congress.



been questioned, except by those who have raised the question from party motives and faction."<sup>10</sup>

In connection with the negotiations for the Treaty of Guadalupe Hidalgo of 1848, ending the war between the United States and Mexico, Article 4 of the projet of the treaty, written by Secretary of State Buchanan and sent to Nicholas P. Trist, the United States negotiator, on April 15, 1847, provided that

"The boundary line between the two Republics shall commence in the Gulf of Mexico *a three leagues* from land opposite the mouth of the Rio Grande, from then up the middle of that river to the point where it strikes the southern line of New Mexico. . . ."<sup>11</sup>

It is significant that at this time a joint resolution was passed by the legislature of the State of Texas providing

"That our Senators be further instructed to oppose any treaty with Mexico which may provide for lessening the boundaries of Texas, as established by an act, to define the boundaries of the Republic of Texas, approved December 19, 1836." Acts, 2nd Leg., 1848, Vol. 2, Ch. 151, p. 218; 3. *Gammel's Laws of Texas* 218.

In a counter-draft of the treaty proposed by the Mexican commissioners, who contended for the Nueces instead of the Rio Grande, a copy of which

<sup>10</sup> Democratic Telegraph and Texas Register, March 2, 1848; 5 *The Writings of Sam Houston*. (Austin, 1941) 29.

<sup>11</sup> Dept. State, 16 *Instructions, Mexico*, 46, 62.

was inclosed in a letter to Buchanan from Trist, September 27, 1847, the fourth article read:

"The dividing line between the two Republics shall commence in the Gulf of Mexico *three leagues* from land opposite the south mouth of the Bay of Corpus Christi, will run straight within the said Bay as far as the mouth of the Nueces River; will then fall into the middle of the said River along its whole course up to its source. . . ."<sup>12</sup>

Trist prevailed and the negotiations were terminated on February 2, 1848, and the treaty signed by Trist and the Mexican commissioner. Texas' 1836 boundary was followed. Article 5 of this treaty, which relates to the boundary line, reads in part as follows:

"The boundary line between the two Republics shall commence in the Gulf of Mexico, *three leagues* from land, opposite the mouth of the Rio Grande. . . ."<sup>13</sup>

In all the negotiations and in the draft of the treaty signed, the three-league boundary theretofore maintained by Texas for ten years was never questioned by either party, even though other portions of the boundary between the United States and Mexico were disputed. Although the original instructions to Trist concerning the boundary were subsequently modified, that portion dealing with the three leagues in the Gulf of Mexico remained unchanged. The importance to this case is that neither Mexico nor the United States had previously claimed

<sup>12</sup> Dept. State, *Dispatches, Mexico*, XIV.

<sup>13</sup> 9 Stat. 922-23.

marginal sea boundaries in excess of two leagues. In the negotiations the Mexicans were concerned with establishing the line at the Nueces rather than the Rio Grande. Clearly, the three-league boundary then agreed upon was the Texas boundary which President Polk and Congress had recognized and agreed to defend.

In the debates in the Senate on the ratification of this treaty, no question was raised as to the validity of that portion of the boundary commencing "in the Gulf of Mexico, three leagues from land. . . ." The treaty was ratified by the Senate on March 10, 1848.<sup>14</sup>

<sup>14</sup> The three-league boundary set forth in the Treaty of Guadalupe Hidalgo was the subject of the following letter from Mr. Crampton, British chargé d'affaires at Washington, to Mr. Buchanan, Secretary of State, on April 30, 1848:

"I have been instructed by Her Majesty's Government to call the attention of the Government of the United States to that part of the 5th Article of the Treaty of Peace between the United States and Mexico, signed on the 2d of February, by which the Boundary line between the two Republics is defined as commencing in the 'Gulph of Mexico, three leagues from Land opposite the mouth of the Rio Grande.' . . .

"I have been directed to state to the United States' Government that, in order to prevent future misunderstanding, Her Majesty's Government think it right to declare that they cannot acquiesce in the extent of Maritime Jurisdiction assumed by the United [States] and by Mexico in the Article in question."

In replying to this letter on August 19, 1848, Mr. Buchanan said:

"In answer I have to state, that the stipulation in the treaty can only affect the rights of Mexico and the United States. If for their mutual convenience it has been deemed proper to enter into such an arrangement, third parties can have no just cause of complaint."

I Moore, *Digest of International Law* (G.P.O. 1906)

The only other major boundary dispute arose between the United States and Texas over the northwestern limits of the State after New Mexico had been ceded by Mexico to the United States. Texas' original boundary act of 1836 encompassed much of the present State of New Mexico and parts of the present States of Oklahoma, Colorado, and Wyoming.

After several months of debate on this question in Congress, Senator Pearce introduced his compromise bill, whereby, in consideration of the reduction of its western and northern boundaries from those previously claimed, Texas was to receive ten million dollars. The debates on this bill clearly show that the members of Congress were well acquainted with the provisions of the 1836 boundary act and all of its implications. Senator Foote, of Mississippi, speaking in the Senate on January 16, 1850, said that

"... title to all the territory claimed for her by the act of 1836, entitled 'An act for defining the boundaries of the republic of Texas,' is one which no ingenuity can undermine and no sophistry elude. Indeed, I suppose that the true limits of Texas will never again be disputed in the Congress of the United States. . . ."<sup>15</sup>

On July 30, 1850, Senator Sam Houston, of Texas, stated to the Senate:

"We have had the same boundary from first to last. We commenced our existence as a nation with a declared boundary; we maintained it in the revolution for eight years, and contended for that boundary when the United

<sup>15</sup> Cong. Globe, 31st Cong., 1st Sess. 166.



States were substituted in place of Texas, and the contest was going on for the attainment of that boundary. None other was ever thought of. . . ."<sup>16</sup>

On September 9, 1850, Mr. Pearce's compromise measure as amended in the House was passed in the Senate.<sup>17</sup> It was signed by President Fillmore on the same day. On November 25, 1850, this compromise measure was approved by the legislature of the State of Texas.<sup>18</sup>

A further acknowledgment by the United States of Texas' three-league boundary in the Gulf is found in the Gadsden Treaty, concluded between the United States and Mexico December 30, 1853.<sup>19</sup> Article 1 of this treaty provides that

" . . . the limits between the Two Republics shall be as follows: Beginning in the Gulf of Mexico, *three leagues* from land, opposite the mouth of the Rio Grande, as provided in the fifth article of the treaty of Guadalupe Hidalgo.

and for the demarcation of this boundary by a joint commission of both countries. The official report of the marking of this boundary, prepared for the Department of Interior, states that

"Lt. Wilkinson, in command of the brig *Morris*, repaired at the appointed time to the mouth

<sup>16</sup> Appendix to Cong. Globe, 31st Cong., 1st Sess. 1447.

<sup>17</sup> Cong. Globe, 31st Cong., 1st Sess. 1784.

<sup>18</sup> Acts 1850, 3rd Leg., Vol. 3, Part 4, Ch. 2, p. 3; 3 Gam-mel's Laws of Texas 832.

<sup>19</sup> Cong. Globe, 33rd Cong., 1st Sess. 1568.

Turn to Card No. 1803 for Chart Appearing  
at This Spot.

of the river and made soundings . . . to trace the boundary as the treaty required, 'three leagues out to sea.'"<sup>20</sup>

This three-league line was actually surveyed again and agreed upon as the international boundary between the United States and Mexico in 1911. See reproduction of charts from the Department of State opposite this page.

That the three-league boundary of the Republic of Texas was retained by the State of Texas upon annexation is shown by the following statement of Riesenfeld:

"With respect to Texas certain historical factors are involved. The sea boundary of the Republic of Texas was by statute fixed at three leagues from land along the Gulf of Mexico. The territory 'properly included within, and rightfully belonging to the Republic of Texas,' was admitted into the Union and became the new state of Texas by two joint resolutions of the federal Congress coupled with one joint resolution by the Congress of the Republic of Texas. The admission was expressly subject, however, to the power of adjustment by Congress 'of all questions of boundary that may arise with other governments.' Such an adjustment was contained in the above-mentioned treaty with Mexico of 1848, which provided for a boundary commencing at sea at a distance of three leagues from land. Even though Secretary Buchanan declared that this stipulation had effect only *inter partes*, it would seem to follow from the three joint resolutions mentioned

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<sup>20</sup> 1 Emory, Report on the United States and Mexican Boundary Survey (Washington, 1857) 58.

above that the gulf boundary of Texas runs at a distance of three leagues from the Gulf coast.”<sup>21</sup>

The three-league boundary of the Republic and State of Texas is also recognized by Geological Survey Bulletin 817 of the United States Department of Interior, where the following is found:

“The area which Texas brought into the Union was limited as follows, as defined by the Republic of Texas, December 19, 1836 (see fig. 14):

“Beginning at the mouth of the Sabine River and running west along the Gulf of Mexico three leagues from land to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between Spain and the United States to the beginning.”<sup>22</sup>

This fact has been recognized also by decisions of both United States and Texas courts.

In *United States v. Texas*, 162 U.S. 1 (1896), the opinion of this Court makes repeated reference to the act of the Texas Congress of December 19, 1836, quoting in full the boundaries declared by this act. The basis of this Court's solution of the Red River

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<sup>21</sup> Riesenfeld, *Protection of Coastal Fisheries Under International Law* (Washington, 1942) 258-59.

<sup>22</sup> Douglas, *Boundaries, Areas, Geographical Centers, and Altitudes of the United States and the Several States*, U. S. Dept. of the Interior, Geological Survey Bulletin 817 (2nd ed. 1930) 36-37; House Document No. 113, 71st Cong., 1st Sess.



controversy in that case was that the boundaries of Texas were fixed before becoming a member of the Union.

One of the most comprehensive cases on the ownership by the State of Texas of the lands within the boundaries of the Republic of Texas is *Amaya v. Stanolind Oil & Gas Co.*, 62 F. Supp. 181 (1945), *aff'd* 158 F. (2d) 554 (C.C.A. 5th, 1946), *cert. den.* 331 U.S. 808 (1947), *reh'g den.* 331 U.S. 867 (1947), which involved the title to certain land between the Nueces River and the Rio Grande. After setting out the Texas boundary act of 1836, Judge Hannay said:

"This act of Texas has never been repealed, and at the time that Texas was finally admitted to the United States, to-wit: December 29, 1845, a new constitution was adopted which expressly provided for the continuation of such prior enactment in full force.

"... During the negotiations of 1844, and in compliance with the call of the Senate, pending the attempt to secure the admission of Texas into the Union, President Tyler sent to the United States a map of the country proposed to be secured as Texas, and upon that map is shown 'Texas and the Countries Adjacent. Compiled in the Bureau of the Corps of Topographical Engineers. From the Best Authorities. For the State Department. Under the Direction of Colonel J. J. Abert, Chief of the Corps, by W. H. Emory, 1st Lieut. T. E. War Department, 1844.' A photostatic copy of this map is hereto attached, marked Exhibit A, and made a part hereof. It accepts as correct the boundaries as defined by an Act of the Texas Congress, approved Decem-

ber 19, 1836, a copy of which Act has been heretofore set out. . . . It was on this map that the negotiations were had which resulted in the annexation of Texas. . . .”<sup>23</sup>

“ . . . The United States recognized that in view of the annexation agreement, Texas was the superior sovereign, so far as land and land titles in Texas were concerned.

“Prior to annexation, Texas as a republic had complete control of all land within its borders.

“ . . . In view of the repeated statements of the Supreme Court of the United States, both before and after annexation and the Treaty of Guadalupe Hidalgo, it is most unreasonable to argue that the Treaty of Guadalupe Hidalgo in any way takes away any of the sovereign rights of Texas respecting land.” (62 F. Supp. 181, *supra*, at pp. 194-200.)

*City of Galveston v. Menard*, 23 Tex. 349 (1869), involved the title to certain flats in the City of Galveston, which were usually covered with water. Holding that the grant by the legislature to defendant included these flats, the Texas Supreme Court said:

“The republic of Texas had the power, through its legislative department, to grant that part of Galveston bay, which lies south of the channel, usually covered with salt water, which constitute what is called the ‘flats’; and thereby vest an exclusive right in Menard to the soil thereof, and to the full ownership of the same, just as if it had been dry land.

<sup>23</sup> The map appears in 62 F. Supp. 181 at page 185.

“This power results, as a necessary consequence of the absolute sovereignty of the republic, over the territory included in its limits. The southern boundary of that territory was defined by an act of the Texas congress, to extend from ‘the mouth of the Sabine river, and running west along the gulf of Mexico, *three leagues* from land, to the mouth of the Rio Grande,’ etc. Hart. Dig. arts 1631 and 1634.” (pp. 390-391.)

In *Kennedy Pasture Co. v. State*, 111 Tex. 200, 231 S. W. 683 (1921), *cert. den.* 258 U.S. 617, certain land in Willacy County was in dispute. After quoting the joint resolution of the Texas legislature enacted April 29, 1846,<sup>24</sup> the Supreme Court of Texas said that this was

“ . . . a reaffirmation of the sovereignty of Texas over all territory within the borders of the Republic as defined by the resolution of December 19, 1836, and proclaimed both its rightful and actual jurisdiction over this territory.” (p. 690.)

*City of Galveston v. Mann*, 135 Tex. 319, 143 S. W. (2d) 1028 (1940), was a mandamus proceeding by the city to compel the Attorney General to approve bonds of the City of Galveston for the construction of a pier extending from the shore 1194 feet into the bed and waters of the Gulf. The question was whether the city had the right to make such construction without a deed or other authority from the State. In denying the mandamus, the Texas

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<sup>24</sup> *Supra*, p. 82, note 8.

Supreme Court reviewed "the legal history of the State's ownership of the waters and submerged lands of the Gulf of Mexico," saying:

"On December 19, 1836, it was enacted by the Senate and the House of Representatives of the Republic of Texas that from and after the passage of that Act, the civil and political jurisdiction of the Republic was declared to extend to the following boundaries, to wit: [the court here set out the description of the boundaries contained in the Act and heretofore quoted. See *supra*, p. 58.]

"This Court in many important decisions has zealously guarded and enforced the rights of this State to the public lands of the State as provided and guaranteed to it in the foregoing resolutions of the Republic of Texas, the resolutions of the United States Congress appertaining to the annexation of the Republic of Texas, and in the Acts passed by the legislature of the State of Texas." (pp. 1032-1033.)<sup>25</sup>

It is settled that the right of a state, upon its admission into the Union, to rely upon its established boundary lines cannot "be impaired by any subsequent action on the part of the United States." *New Mexico v. Colorado*, 267 U.S. 30, 41 (1925). See also *United States v. Utah*, 283 U.S. 64, 88-89 (1931).

*Louisiana v. Mississippi*, 202 U.S. 1 (1906), involved a boundary dispute between these two states.

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<sup>25</sup> See also *State v. Jadwin*, 85 S. W. 490 (Tex. Civ. App. 1904, error ref.).



In speaking of a possible repugnancy as to boundaries between the acts admitting Louisiana and Mississippi, the Court said that

“If it were true that this repugnancy between the two acts existed, it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that state and give it to Mississippi. The rule, *Qui prior est tempore, portior est jure*, applied, and § 3 of Art. 4 of the Constitution does not permit the claims of any particular state to be prejudiced by the exercise of the power of Congress therein conferred.” (pp. 40-41.)

From what has been said, the State believes it can clearly show upon a full development of the evidence that Texas' three-league Gulfward boundary was reasonable and was accepted and recognized by the United States and other nations.

The nature of defendant's evidence as to the legal regime which was applied to the seabed and subsoil within that boundary must now be outlined.

(2) *Under International Law, by Including This Marginal Belt Within its Boundaries, the Republic of Texas Became the Owner of Its Seabed and Subsoil vis-a-vis Other Nations.*

In approaching this question at the outset, it is important to remember that our primary inquiry is whether the defendant's evidence will show that the Republic of Texas as an independent nation was the owner of the seabed and subsoil within its gulfward boundaries under international law as it had developed up to and including the period 1836-1845. Plaintiff's contrary interpretation of the status of

international law (regarded as an expression of the customs and usages of nations) has made this inquiry one of fact as well as of law. Its determination will require an examination of the practice of nations in their customs and usages *inter se*, which practice in turn evidences the then existing state of international law. Defendant plans to present to the Court the testimony of some of the world's leading experts on this issue if plaintiff persists in its interpretation. In the meantime, defendant presents herein a collection of statements of all international law writers whose works are available and who treated this question of ownership. See Appendix, p. 18.

Plaintiff admits (brief, p. 49) that "As for territorial jurisdiction, there is no doubt that the Republic [of Texas] openly claimed the marginal sea within its boundaries. . ." and the recognition and maintenance thereof has been shown under the boundary discussion above.

The ownership by the sovereign of all land (not previously granted) within its boundaries is an elementary principle of both international and domestic law. The common law rule is stated in Bacon's Abridgement:<sup>26</sup>

"The king by our law is universal occupant, and all property is presumed to have been originally in the crown. . . ."

That the principle applies alike to submerged lands and uplands was expressed by Hall<sup>27</sup> as follows:

<sup>26</sup> Edition by Bouvier (Philadelphia, 1869), vol. 8, p. 13.

<sup>27</sup> *Essay on the Rights of the Crown in the Sea-shore of the Realm* (first published in 1830), 3d ed. reprinted in Moore, Stuart A., *History and Law of the Foreshore and Sea Shore* (London, 1888) 667.

"The title of the King of England to the land or soil *aqua maris cooperata*, is similar to his ancient title to all the *terra firma* in his dominions, as the first and original proprietor and lord paramount. It is a fundamental principle of our laws of property in land, *that all the lands in the realm belonged originally to the King.*"

The principle was applied to submerged lands in the English case of *Benest v. Pipon*<sup>28</sup> in which the Privy Council stated:

"What never has an individual owner belongs to the Sovereign within whose territory it is situated. . . ."

This Court recognized that principle in the case of *Johnson v. McIntosh*, 8 Wheat. 543, 595 (1823), where it is said:

"According to the theory of the British constitution, all vacant lands are vested in the crown, . . . this principle was as fully recognized in America as in the islands of Great Britain."

In *United States v. Bevans*, 3 Wheat. 336, 386-387 (1818), Chief Justice Marshall said:

" . . . What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; coextensive with its legislative power."

<sup>28</sup> 1 Knapp 60, 12 Eng. Rep. 243 (Privy Council, 1829).

In *Rhode Island v. Massachusetts*, 12 Pet. 657 (1838), this Court said:

"It follows, that when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction and sovereignty are inseparable incidents, and remain so, till the state makes some cession. The plain language of this court in the *United States v. Bevans*, 3 Wheat. 386 et seq., saves the necessity of any reasoning on this subject . . . . Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled, when boundary is ascertained, which, being the line of territory, is the line of power over it. . . ."

• It remains only to be shown that the lands and minerals within Texas' original boundaries were susceptible of ownership (subject, of course, to innocent passage and use of the waters) during the period of 1836-1845 under the existing rules of international law. Had the distinction between "open" or "high" seas and the shallower marginal belt of "territorial waters" been fixed at that time to the extent that a nation acquired ownership of the bed and subsoil of that part of the marginal belt brought within its boundaries?

Plaintiff made an excellent affirmative argument for us on this question in the *California* case. There plaintiff took the position that neither the territorial sea limit nor the ownership concept had become developed prior to 1776 and reasoned therefrom that the original States did not separately acquire such ownership. But, plaintiff argued, soon after 1776 the concepts of territory and ownership began to be



*accepted by the nations of the world.* Plaintiff went on to show that the concepts had become fully developed before July 7, 1846, or at least July 4, 1848, when it claimed to have obtained title to the California marginal sea from Mexico. In its brief in the *California* case, the United States said:

"The conquest of California by the United States is regarded as having been completed on July 7, 1846. . . . It is undisputed that the United States acquired complete right in the submerged lands from Mexico. . . . It is the Government's position, on the other hand, that the rights in the marginal sea never did pass from the United States."<sup>29</sup>

In this case the Government now says:

"And the 19th and 20th century materials collected in the Government's brief in the *California* case . . . indicate that the general international law acceptance of the concept came about in the *latter portion* of the period, the notion of a three-mile territorial belt, both in its territorial and property sense, being very immature, if not foetal, in 1845."<sup>30</sup>

It is difficult to see how the United States could have been said to have obtained proprietary rights in offshore submerged lands against California in 1846 or 1848 if property rights in the coastal belt were "very immature, if not foetal, in 1845."

<sup>29</sup> Brief in Support of Motion for Judgment, *United States v. California*, No. 12, Original, Oct. Term, 1946, pp. 58-59.

<sup>30</sup> Brief in Support of Motion, p. 45.

Plaintiff's argument in the *California* case (as distinguished from that which it now makes) that by 1846 the concept of sovereign ownership of the seabed and subsoil of the maritime belt had become definitely fixed in international law is borne out by reference to the sources to which this Court has looked to determine that law. Such a reference will, by the same token, positively disprove its present argument. As to these sources the Court has said:

"International law is a part of our law, it must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these to the works of jurists and commentators who by years of labor, research, and experience have made themselves particularly or peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is." *The Packet Habana*, 175 U.S. 677, 700 (1900).

All of the international law publicists who dealt with the subject and whose writings were published prior to 1845 recognized that the coastal nation under then existing international law and practice held both sovereignty (*imperium*) and ownership (*dominium*) in the seabed and subsoil of the marginal sea.

What they had to say is shown on the chart of opinions of jurists and publicists (Appendix, p. 18). Since plaintiff here claims that the notion of a territorial belt "both in its territorial and property sense [was] very immature, if not foetal, in 1845," those works of publicists which appeared between 1776 and 1845 are most pertinent to the issue thus posed by plaintiff. To these we now turn.

Giovanni Lampredi, Italian publicist, writing in 1776, said:

"Therefore it cannot be doubted that these parts of the sea can be subjected to dominium and to imperium, for the sake both of utility and security."<sup>31</sup>

Ferdinando Galiani, Italian statesman, wrote in 1782:

"Finally, it is well established that the edge of the open sea which washes the shore of the land belongs to and is regarded as incorporated with the territory, and forms a part of it."<sup>32</sup>

Georg Friedrich von Martens, German jurist and publicist whose work, translated into English by William Cobbett in 1802, was dedicated to President Washington and subscribed to by all members in Congress, declared:

"In order to better understand the rights of nations in the seas and waters in general, it is essential to distinguish property from empire.

<sup>31</sup> *Juris Publici Universalis Sive Juris Naturae et Gentium Theoremata* (2d Italian ed., Cacchi, Milan, 1828) 180.

<sup>32</sup> *Dei Doveri dei Principi Neutrali* (2d ed., Bologna 1942) 132.

The first implies the right to enjoy a thing exclusively, and even to dispose of it; the second, a right to demand obedience, respect, and honor, from those who make use of it."

"... the seas surrounding the coast ... are ... entirely the property, and subject to the dominion of the master of the coast. ..."<sup>33</sup>

Pierre Boucher, writing in 1803, said:

"... The sea which washes the coast of a state is property, or a continuation of its territorial property."<sup>34</sup>

Joseph Rayneval, writing in the same year, said:

"The sea which washes the coast of a state is considered to be a part of it; ... we might add that the bottom of the sea, along the coast, can be considered as having been a part of the continent, and that it is therefore considered as still forming part of it."<sup>35</sup>

Azuni, Italian juriconsult, cited by this Court in *United States v. California*, said in 1806:

"The right of sovereignty along the seashore flows from the territorial domain."

"It follows from this fundamental principle, that the empire of the sea, according to the system established in the preceding chapter, is

<sup>33</sup> *Précis du droit des gens moderne de l'Europe* 159-160, 168.

<sup>34</sup> *Institution de droit maritime* (Paris, 1803) 46.

<sup>35</sup> *Institution du droit de la nature et des gens* (Paris, (1803) 161.



not to be regarded as a vain jurisdictional right . . . but has the real effect of every other kind of property. It differs in nothing from that of the land."<sup>36</sup>

Theodore Schmaltz, German publicist, said in 1817:

"Moreover, the sea along the coast has always been regarded as the property of that country."<sup>37</sup>

Joseph Angell; the first American writer to deal specifically with the question, said in 1826:

"To the King, therefore, is not only assigned the sovereign dominion over the sea adjoining the coast, and over the arms of the sea; but in him is also vested the *right of property* in the *soil thereof*." (Author's emphasis.)<sup>38</sup>

Robert Gream Hall, in his famous essay on *The Rights of the Crown and the Privileges of the Subject in Sea-Shores of the Realm* (London, 1830) 4, 2, said:

"The title of the King of England to the land or soil *aqua maris cooperta*, is similar to his ancient title to all the *terra firma* in his dominion, as the first and original proprietor and lord paramount."

<sup>36</sup> 1 *Droit maritime de l'Europe* (tr. Johnson, New York, 1806) 186, 224.

<sup>37</sup> *Das Europäische Völker-Recht* (Berlin, 1817) 141.

<sup>38</sup> *A Treatise on the Right of Property in Tide Waters and in the Soil and Shore Thereof* (Boston, 1826) 18.

"This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very *fundum* or soil at the bottom of the sea."

William Woolrych, also writing in 1830, said:

"It is agreed, that as the King has the sovereign dominion over the seas adjoining to the coasts, and over the navigable rivers, he has also a right of property in the soil."<sup>39</sup>

That this was likewise the understanding of the Spanish and Latin-American world was indicated by Andrés Bello, Venezuelan diplomat and later professor of international law in Chile. Writing in 1832, he said:

"Regarding the sea, there is a generally admitted rule: Each nation has the right to consider as pertaining to its territory and subject to its jurisdiction the sea which washes its coast out to a certain distance."<sup>40</sup>

Jakob Saalfeld wrote in 1833:

"The shore and the part of the sea which washes it are the property of the state."<sup>41</sup>

<sup>39</sup> *A Treatise on the Law of Waters and of Sewers, Including the Law Relating to Rights in the Sea* (London, 1830) 19.

<sup>40</sup> *Principios de Derecho de Jentes* (Santiago de Chile, 1832) 31.

<sup>41</sup> *Handbuch des Positiven Völkerrechts* (Tübingen, 1833) 93.

Henry Wheaton in the first edition of his *Elements of International Law*, which appeared in 1836, said:

“Its [the sovereign’s] rights of property and territorial jurisdiction are absolute and exclude those of every other nation.”<sup>42</sup>

In 1844, A. W. Heffter, a German jurist, wrote:

“It is admitted by most that the national property . . . extends . . . (c) over the whole coastal sea, as far as can be kept in exclusive possession, either from the coast or by the ever present naval power and defense works. . . .”<sup>42a</sup>

Juan Sala, a Mexican publicist, writing in 1845, said:

“The various uses made of the sea near the coast make it susceptible of ownership as to that portion adjacent to the land. . . . This use of the sea coupled with the faculty they [nations] have to prohibit other nations from so doing, has converted the sea as to this portion thereof into property no different than the lands occupied by them.”<sup>43</sup>

Hautefeuille, a French jurist, writing in 1848, said:

“Territorial seas . . . are under the sovereignty of the nation who is mistress of the

<sup>42</sup> *Elements of International Law* (Philadelphia, 1836) 142-143.

<sup>42a</sup> *Das Europäische Völkerrecht der Gegenwart* (Berlin, 1844) 131.

<sup>43</sup> 2 *Sala Mexicano, o sea La Ilustración al Derecho-Real de España* (Mexico, 1845) 11.

coast washed by them; they are under her dominion in the same manner and by the same title as the land.

“... according to primary law, the territorial sea can be brought under the sovereign domain, and . . . it is the property of the riparian nation.”<sup>44</sup>

That this was recognized during all the prior period as the law of Spain is shown by Antonio Riquelme in 1849:

“The rule recognized by the law of nations for determining the legal status of the littoral seas is based on the idea that all is lawful for the lord of the coasts which his own preservation demands and which cannot prevent innocent use by others. . . . a right of property is possible over the littoral sea. . . .”<sup>45</sup>

We have found no authority to the contrary during the entire period of 1670-1845. As shown by the chronological chart of Opinions of Publicists and Jurists, Appendix, page 18, at least thirty-five writers from the leading nations of the world spoke of the ownership concept as being fully developed. They distinguished between “high seas” where ownership

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<sup>44</sup> *Des droit et des devoirs des nations neutres en temps de guerre maritime* (Paris, 1848) 231.

<sup>45</sup> *Elementos de Derecho Público Internacional* (Madrid (1849), p. 209. Don Antonio Riquelme, who published his treatise while he was Chief of Section in the Spanish Ministry of State, probably closely represented the official view of the Government of Spain. This is a permissible inference from the position he occupied in that government. His work was published with royal permission.



was forbidden and the "territorial" marginal seas where ownership as well as sovereignty was recognized (subject to innocent passage).

There is not the slightest authority in support of plaintiff's reversal of position since the *California* case. The authorities show plaintiff was correct then in arguing that the ownership concept was fully developed by 1846-1848 rather than now when it argues that the concept was in 1845 "very immature if not foetal."

Again, as shown by the chart, Appendix, p. 18, this ownership as well as sovereignty concept with relation to the bed and subsoil has been recognized by substantially all publicists and jurists since 1845. At least eighty-five publicists and jurists have confirmed it during the period. Only eight have taken the opposite view, and they refer principally to the waters rather than the bed and subsoil. Sixteen have recognized the distinction between rights in the marginal belt and those in the high seas beyond, but do not touch directly on ownership. The official view of the United States was expressed at the League of Nations Conference at The Hague in 1930, where the United States declared:

" . . . the sea-bottom and subsoil covered by the territorial waters, including fish and minerals, are the property of the United States or the individual states where they border."<sup>46</sup>

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<sup>46</sup> Reply of the United States to the Bases of Discussion, March 16, 1929, League of Nations Conference for the Codification of International Law, Bases of Discussion, C.74. M.39.1929. V. p. 128.

In fact, the only uncertainty which has existed during the 1670-1950 period has been as to the maximum extent of the territorial waters which may be included within a nation's boundaries. Even this uncertainty did not apply to the bed, subsoil, and minerals, because the countries which contended most strongly for a three-mile maximum limit actually claimed and possessed submarine mines, pearl beds, and exclusive fisheries beyond that distance.<sup>47</sup>

Riesenfeld has proved beyond a question that there was not in 1836-1845 and has not been since that time any fixed maximum limit of territorial waters in international law, and that the three-league boundary of Texas was reasonable and carried with it all the rights commonly understood by nations to exist in lands and minerals beneath territorial waters.<sup>48</sup>

Needs of the littoral State and acquiescence by other nations control the extent as long as within reasonable bounds.<sup>49</sup> Since The Hague Conference for the Codification of International Law in 1930, no publicist has contended that there is a maximum limit or that the bed, subsoil, and minerals are not subject to ownership.

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<sup>47</sup> Vattel, *The Law of Nations*, *supra*, p. 104: "Who can doubt that the pearl fisheries of Barem and Ceylon may lawfully become property?" See also Bingham, *Report on International Law of Pacific Coastal Fisheries* (Stanford, 1938), and Riesenfeld, *supra*, pp. 277-282.

<sup>48</sup> Riesenfeld, *supra*, pp. 258-259, 277-282.

<sup>49</sup> See boundary discussion, pp. 63-69, *supra*. It is significant that when Thomas Jefferson in 1793 provisionally proclaimed United States' jurisdiction over a three-mile belt he said it was the "smallest distance . . . claimed by any nation whatever." He later advocated the extended distance of sight from shore. 1 Moore, *Digest of International Law* (G.P.O., 1906) 702-703.

REPLY TO PLAINTIFF'S PRESENT CONTENTIONS

It is worthwhile to examine briefly at this point the arguments adduced by the plaintiff in support of its contention that the "Republic of Texas did not have the rightful jurisdiction over or ownership of the off-shore land."<sup>50</sup> Plaintiff first seeks to cast doubt on (a) "whether the Republic had, or ever asserted, any valid claim to ownership or sovereignty over the marginal sea." Irrespective of what this Court may ultimately find upon a full hearing of the case on its merits, it is obvious from the specific writings of these publicists that there is little doubt that this issue must ultimately be resolved in favor of the defendant.

Further, the plaintiff merely suggests the existence of a doubt without adducing the support of authorities which have adequately considered this question. The case of *Queen v. Keyn*, L. R. 2 Ex. D. 63 (1876), upon which plaintiff relies, is a thoroughly discredited case. It was decided by a narrow majority of two judges (13-11) and was immediately reversed by an Act of Parliament,<sup>51</sup> which in its preamble declared that:

"the rightful jurisdiction . . . extends and *has always extended* over the open seas adjacent to the coast . . . to such a distance as is necessary for the defense and security of this island."

<sup>50</sup> Brief in Support of Motion for Judgment, pp. 44-49.

<sup>51</sup> Territorial Waters Jurisdiction Act of 1878, 41 & 42 Vict., chap. 73.

Speaking of this case in *Carr v. Francis Times & Co.*, [1902] A. C. 176, 181, Lord Halsbury said:

“For whatever purpose *Queen v. Keyn* was quoted, this, I think, is manifest: speaking of it as an authoritative judgment, I cannot forbear from saying that, somewhat unusually, the Legislature of this country in the next session but one passed an Act of Parliament reversing that judgment—that is to say, affirming *in the strongest terms that the decision which had been arrived at by the majority (a very narrow majority) in that case was one that was not the law of England*; because the Act does not purport simply to alter the law, but it declares the law and says, in very plain terms, that that is and always has been the law of this country.”

Judge John Bassett Moore in the *Wimbledon* case<sup>52</sup> before the Permanent Court of International Justice in 1927 said of the case:

“Indeed, on a careful study of the case, it is difficult to avoid the conclusion that a vote of the majority was in no small measure determined by a powerful, but composite and somewhat torrential opinion of eighty pages delivered by Sir Alexander Cockburn, then Chief Justice of the King’s Bench, *the disturbing effects of which it was necessary to remove in order that the majestic stream of the common law, united with international law, might resume its even and accustomed flow*. This was done by the Act of Parliament above mentioned which declared that the ‘rightful juris-

<sup>52</sup> 2 Hudson, *World Court Reports*, 71-72.



diction' of Her Majesty not only extended but had 'always extended' over her coastal waters and made British criminal law applicable to all offenses committed on the open sea within a marine league of the coast measured from low-water mark."<sup>53</sup> (Emphasis supplied.)

Plaintiff also quotes from the dicta of Viscount Haldane in the case of *Attorney-General for British Columbia v. Attorney General for Canada* [1941] A. C. 153, 174-175. (Plaintiff's brief, p. 46.) In plaintiff's *California* brief, Viscount Haldane's opinion was recognized as pure dicta and was followed by these words in the brief:

"However, three years later the Privy Council answered the question it had refused to answer in the earlier case, and held that islands that arose in the sea within three miles of British territory as property of the Crown, because the bed of the sea within three miles of the coast is the property of the Crown. *Secretary of State for India v. Chelikani Rama Rao*, L. R. 43 Ind. App. 192 (1916)."<sup>54</sup>

—a decision which plaintiff now cites merely with the symbol "*cf.*"

It is thus apparent that the plaintiff's assertion "it is impossible to say, we think, that the idea of state ownership of the subsoil existed in 1845 in any sense in which Texas can now take advantage" rests upon a slender thread.

<sup>53</sup> The case has again been recently criticized in H. A. Smith, *Law and Custom of the Sea* (London, 1948) 35.

<sup>54</sup> Brief in Support of Motion, *U. S. v. California*, p. 50.

Plaintiff's argument that "the Republic had a potential, but dormant, claim to paramount control and ownership" which passed to the United States in 1845 as an incident of national external sovereignty ignores the fundamental distinction which was pointed out so clearly by von Martens in 1789:

"In order to better understand the rights of nations on the seas and waters in general, it is essential to distinguish property from empire. The first implies a right to enjoy a thing exclusively, and even to dispose of it; the second, the right to demand obedience, respect, and honor, from those who make use of it."<sup>55</sup>

The defendant respectfully submits that if it is permitted fully to develop the facts of international customs and usages supported by all existing opinions of publicists, domestic law dispositions of the states of the world, and the testimony of experts who have made lifelong studies of the question, it can remove any doubt that might exist as to the Republic's established and clearly defined property rights in the seabed of the Gulf of Mexico and the subsoil minerals within its three-league boundary.

This proprietary right was likewise recognized and incorporated in the domestic law which the Republic extended over its territory.

(3) *Under Domestic Law the Republic of Texas Owned a Separate Estate in the Mines and Minerals under the Three-League Belt.*

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<sup>55</sup> Von Martens, Georg Friedrich, *Précis du droit des gens moderne de l'Europe* (Paris, 1789) 159-160.

THE SPANISH LAW APPLICABLE TO MINERALS IN TEXAS

It is undisputed that Texas obtained its original system of mineral law from its predecessor Spanish and Mexican sources. Under this law the sovereign was the owner in place of the minerals in all lands within its boundaries, whether they be public, private, or common lands. This Spanish mineral law applied to Texas when it, as a part of Mexico, was under the dominion of Spain until 1821. It remained in effect when Mexico achieved its independence from Spain in 1821 and when Texas won its independence from Mexico in 1836. The Texas Constitution of 1836 so provided. Because of the volume of material on the nature and effect of this law which created *dominium* in the sovereign in a separate mineral estate, entirely severable from its governmental powers as well as public and private rights in the surface of the soil, most of the authorities are set forth in a memorandum attached at page 69 of the Memoranda and Appendix. (Also see Dean Roscoe Pound's treatment of the subject, Memoranda and Appendix, page 1.)

The Spanish-Mexican mineral concepts had become so fixed in the property law of Texas that they were specifically retained when the common law was otherwise adopted by the Republic of Texas in 1840. Its adoption of the common law in that year specifically provided that it did not apply to "such laws as relate to the reservation of islands, salt lakes, licks, and salt springs, mines and *minerals of every description* made by the general and State governments,"<sup>50</sup>

<sup>50</sup> Laws, Republic of Texas, 4th Cong., 1840, pp. 3-4; 1 Gammel's Laws of Texas 177. Copy in Appendix.

As hereinafter shown, this separate ownership of mines and minerals was recognized by the United States in the draft of the original treaty for annexation of Texas which provided for cession of all its territories to the United States, "including vacant lands, mines, minerals," etc.<sup>37</sup> Mines and minerals were enumerated separately from lands. This treaty was defeated by the United States Senate. The counter-proposal made in the form of a Joint Resolution by the United States Congress provided that Texas retain its "vacant and unappropriated lands" and pay its own debts. It is highly significant that practically all of the many drafts of this counter-proposal contained a cession of "mines and minerals" along with forts, navy, etc. They were again enumerated and considered separately from lands. However, the "mines and minerals" were stricken from the Resolution before final passage in the House, and their omission was specifically noted with apparent approval in the Senate. Thus, the final Annexation Agreement, adopted by the Congress of the United States and later approved by Joint Resolution of the Congress of the Republic of Texas, not only left to the State its vacant and unappropriated lands but also its separate estate in the mines and minerals.

As a part of the annexation procedure, Texas adopted a new Constitution which was approved by the United States Congress. It included provisions heretofore quoted retaining all "laws now in force in the Republic of Texas," and providing that "rights

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<sup>37</sup> 4 Miller, *Treaties and Other International Acts of the United States of America* (1934) 697.



of property . . . shall remain precisely in the situation which they were before the adoption of this Constitution."

So fixed was the law of sovereign ownership of the minerals in Texas that a constitutional provision was necessary in order to effect a release of minerals to the then private owners of the soil when such action was deemed advisable in 1866.<sup>58</sup> Similar releases were made in 1869 and 1876. As later held in *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149 (1912), these releases applied only to minerals in lands on which title to the surface had previously passed from the sovereign. They were retrospective, not prospective, and did not amount to a union or merger of the mineral estate and the surface of the State's unsold lands.

#### HISTORY OF SOVEREIGN SEPARATE MINERAL ESTATE

The history and precise nature of the rights vested in the crown, both as to Spain and its colonial possessions in the Americas, are described by Gamboa in his *Commentaries on the Mining Ordinances of Spain* (1761), translated in Rockwell's *Spanish and Mexican Law* (1851). Gamboa says:

"In Spain, under the law of the *Partida*, the property of the mines was so vested in the king that they were held not to pass in a grant of the land, although not excepted out of the grant . . .

"Philip II. acting under the authority of the council and chief accountants, vested the mines wheresoever situate, and whether in public or private ground, in the crown."

<sup>58</sup> Art. VII, Sec. 39, Constitution of 1866; 5 Gammel's Laws 880.

This was the accepted status of sovereign ownership of the minerals when vast new sources of gold, silver, quicksilver, lead, and other deposits were discovered in Spain's American possessions. Even oil, tar, and pitch were known and being used for less valuable purposes. By the time Gamboa published his *Commentaries* in 1761, there was a great demand in Mexico for a new code of mining laws, and this demand resulted in a compilation by Mexican authorities of the mining ordinances of May 22, 1783, later promulgated by King Charles III, which remained in effect as the law of Mexico and Texas on this subject.

This famous code, quoted in the memorandum in the Appendix, enumerated the minerals owned in place by the sovereign and made subject to exploration as

“ . . . not only the mines of gold and silver, but also those of precious stones, copper, lead, tin, quicksilver, antimony, calmine, bismuth, rock salt and other stoney matter (fossils), be they ores or semi-minerals, *bitumen*, and *liquids* (*juices*) of the earth. . . .” (Rockwell *supra*, pp. 54-55.)

Dr. Walter Howe has recently published a book, *The Mining Guild of New Spain and Its Tribunal General, 1770-1821* (Harvard University Press, 1949), in which he describes the sovereign's rights under the “famous mining ordinances of 1783” as follows:

“*Ultimate ownership* of mineral deposits continued to rest with the crown, while the ‘*dominium utile*’ was conceded to individuals. This

provision, carried over virtually without change into the Mining Code of the Mexican Republic, is of interest in giving precedent to the provision of Art. 27 of the Constitution of 1917 which declares the nation to be *ultimate owner* of all mineral deposits." (p. 67.)

In his comprehensive treatise on *American Law Relating to Mines and Mineral Lands* (1897, 1903, 1914), Curtis H. Lindley says:

"Ownership of mines under Mexican law.— Under the laws in force in Mexico at the date of the treaty of Guadalupe Hidalgo, mines *whether in public or private property*, belonged to the supreme government. (pp. 199-220.)

"No interest in the minerals of gold and silver passed by a grant from the government of the land in which they were contained, without express words designating them. Such grant only passed an interest in the soil *distinct from that of the minerals* . . . .

"In other words, *there was a severance of the title to the minerals from the title to the land.*" (p. 200.)

#### COURT DECISIONS

There are several Texas cases and texts directly in point on this subject. They are quoted from at length in the memorandum in the Appendix. One, *State v. Parker*, involved salt under a large lake in Hidalgo County.

In *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149 (1912), the Supreme Court of Texas construed the effect of the 1866 and 1876 constitutional releases of

minerals to the then owners of the soil as applying retrospectively and not prospectively. They had no effect on the existing separate mineral ownership of the State in unsold lands and minerals.

In *United States v. Castillero*, 2 Black 17 (1862), this Court was unanimous in holding that under the Spanish Mining Ordinance of 1783, which remained in force in Mexico in 1848, the Crown and its successor, the Republic of Mexico, owned the minerals as a separate estate.

As to this, Mr. Justice Clifford, writing for the majority, said:

*"Property in mines not discovered and registered according to law, whether the mine was on public or private lands, was vested, as has already appeared, exclusively in the Supreme Government, so that private persons could not acquire it or any interest in it in any other mode than that prescribed in the provisions of the mining ordinance. . . ."* (p. 169.)

and later

*"Mines under Mexican laws, as before explained, whether situated in public or private lands, belong to the Supreme Government, and private persons can only acquire a title in one not previously discovered and made individual property according to law, by conforming substantially to the conditions ordained in the provisions of the 4th article of the Mining Ordinance as herein previously recited. . . ."* (p. 190.)

We will not burden the Court with extensive quotations from this lengthy opinion. A more thorough-



going examination of the sovereign rights of Spain; Mexico and Texas in undiscovered minerals wherever located could hardly be found.

Without exception, every available authority on the subject concludes that the Spanish-Mexican-Texas mineral law vested in the sovereign a separate and distinct ownership of the mineral estate in all lands within the borders of the Republic.

#### THE MINERAL ESTATE INCLUDES OIL

The authorities uniformly concede that oil was included within the Spanish Mining Ordinances of 1783 and its subsequent application in Mexico, Texas, and South American countries. Many of them are cited and quoted from in the memorandum on this subject in the Appendix.

As heretofore pointed out, the ordinances were drawn up in Mexico after a demand arose there for a code more applicable to the problems of mining in "New Spain." They were the first Spanish ordinances which specifically described liquid substances as within "all the mines and minerals reserved to the Crown." Article 22, Title 6, listed the minerals as including "bitumens or juices of the earth.

According to Mexican history, oil, pitch and tar were known and used long prior to 1783. A detailed account is contained in *Mexico's Oil* (1940), a publication issued by the Mexican Government.

Defendant has an abundance of evidence in the form of letters, newspaper articles, and testimony showing that oil was also known and had valuable uses in the precise area in controversy long prior to 1845.

THE SEPARATE MINERAL OWNERSHIP EXTENDS BENEATH  
RIVERS, LAGOONS, AND OTHER TERRITORIAL WATERS

Under Spanish, Mexican and Texas law the sovereign's separate mineral ownership extended to all minerals within the "realm," "borders," or "jurisdiction," whether in private, public, or common lands.

Rivers, ports, public roads, the sea and its shores were said by the early Spanish law to be common or public. Gamboa says the crown's mineral ownership was in all lands "wheresoever situate" in the entire realm "whether in public or private ground." Solorzano says "where they are found," whether "in public places or in lands and possessions of individual persons." He specifically refers to "rivers and public waters."<sup>59</sup>

Lares also says "wherever they might be found, whether out in public lands, or whether privately owned estates or lands." Fonseca and Urrutia are in accord, showing that salt was taken from the lakes themselves, the basins and shores of the lakes, and the sea.<sup>60</sup>

In the Philippine Islands, which were also a part of the Spanish Colonial empire, the same laws are in force as prevailed throughout the Spanish Colonies in America. In the recent case of *W. H. Lawrence v. Garduño*, the Supreme Court of the Philippines declared that under the old mining laws of the Philippines, inherited from Spain, and under its new laws which went into effect November 15, 1935,

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<sup>59</sup> Juan de Solorzano Periera, *Politica Indiana* (1701), Book VI, Chap. XIII.

<sup>60</sup> Fonseca y Urrutia, *Historia General de Hacienda* (Mexico, 1845 and subsequent years), Vol. IV, pp. 6-140.

“Mineral deposits whether found in or under public or private lands or beneath rivers, lakes, lagoons, gulfs, bays, and seas within the maritime jurisdiction of the Philippines belong to the State and the disposition, exploitation, development or utilization shall be at the discretion of the State.”

In Scotland, another civil law country, this rule of law was described in *Lord Advocate v. Clyde Navigation Trustees*, 19 Sess. Cas. (4th ser.) 174, 177-178 (1891). The Court said:

“Is the Crown’s right in that strip of sea proprietary, like the Crown’s right in the fore-shore and in the land—or is it only a protectorate for certain purposes, and particular navigation and fishing?

I am of the opinion that the former is the correct view. . . . Such I consider is the result of all the best authorities—Scotch, English, and foreign. . . . It has been affirmed on many occasions by high judicial authorities both in Scotland and England. It has also received practical effect in various judgments with respect, inter alia, to *minerals under the sea*, mussel-beds and oyster-beds, *maritima incrementa*, and *flotsam and jetsam*.” (Citing cases.)

All precedents on the subject indicate that the sovereign’s separate mineral ownership was coextensive with the state’s boundaries, including inland and coastal waters of the marginal belt. For instance, under the same Spanish law by which Texas claims its inland water and marginal belt minerals, Chile has for nearly 100 years produced or leased for pro-

duction the undersea coal deposits under the Pacific off the coast of Lota. Today, the oldest mine has 50 miles of tunnels from the upland into the producing veins as far as four miles from shore beneath Chile's marginal belt along the Pacific Ocean.

Under the same law, Peru owns and operates or leases a coal mine beneath its territorial sea in the Pacific, and Venezuela, Peru, Argentina, and Mexico have wells producing oil from beneath their marginal belts on the Atlantic, Pacific, and Gulf of Mexico, as well as from beneath other territorial waters. There are 2,000 wells in Lake Maracaibo, Venezuela, the farthest well extending 11 miles out in the water.

Upon a hearing of this case on the merits, the defendant will submit additional evidence in support of the foregoing facts and precedents, including maps and technical data with respect thereto, and specifically showing their value, knowledge, and use by the Republic of Texas.

Texas has continuously asserted title to the minerals under its submerged lands. Since 1917 there have been laws authorizing mineral leases on river beds and channels. Since 1919, mineral leases have been authorized on all "salt water lakes, bays, inlets, marshes, reefs . . . and that portion of the Gulf of Mexico within the jurisdiction of Texas."<sup>61</sup> The maintenance of its separate mineral estate in

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<sup>61</sup> Acts 1919, 36 Leg. 2d called sess. ch. 19; 19 Gammel's Laws of Texas 51.



these lands is best evidenced by the Legislature's wording of the present Act in 1939:

"The mineral estate in river beds and channels and in all areas within tidewater limits, including islands, lakes, bays, and the bed of the sea, belonging to the State of Texas, are hereby set apart and dedicated to the permanent school fund."<sup>62</sup>

THE MINERAL ESTATE WAS SEVERABLE FROM THE SOIL  
AND SOVEREIGNTY; IT DID NOT PASS TO THE  
UNITED STATES

As heretofore mentioned and hereinafter shown, the separate mineral ownership by the Republic of Texas was known to and considered by the United States Congress. The provision for cession of the mines and minerals was stricken from the draft of the Annexation Resolution. They were not ceded by any other clause in the Resolution, and were intended to be ~~reserved~~ to the State of Texas, as evidenced by their omission from the cession, and by the ~~reservation~~ <sup>retention</sup> of "vacant and unappropriated lands lying within its limits." Although separate from the ownership of the soil, a general reservation of "lands" includes separate mineral estates. *United States v. Castillero*, 2 Black 17 (1862). <sup>note</sup>

Under the mineral laws of Texas, the separate mineral estate did not pass except by specific grant. It did not pass by the transfer of national sovereignty to the United States. *United States v. Castillero*.

<sup>62</sup> Art. 5421c-3, Sec. 2, Vernon's Annotated Texas Civil Statutes.

supra; *Moore v. Smaw* and *Fremont v. Flower*, 17 Cal. 199 (1861). In the latter opinion by Mr. Justice Field, then a member of the Supreme Court of California, it was said:

*"Such ownership stands in no different relation to the sovereignty of a State than that of any other property which is the subject of barter and sale. Sovereignty is a term used to express the supreme political authority of an independent State, or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority. . . . The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty."* (pp. 218-219.)

It therefore follows that regardless of who may have or not have technical ownership of the bed of the sea or the waters of the Gulf of Mexico within the original boundaries of Texas, the State's Public School Fund nevertheless owns the mineral estate therein and thereunder.

(4) *Under the Common Law Adopted in 1840 the Republic of Texas Owned the Bed beneath the Three-League Belt as well as the Mines and Minerals Which It Contained.*

By adoption in 1840 of the common law "as a rule of decision" the Republic of Texas adopted a system of domestic law clearly providing for a proprietary right of ownership in the sovereign to the seabed and subsoil of all of the coastal submerged lands within its declared boundaries. The title and ownership of Texas under the common law is distinct from, and in addition to, its separate estate in the minerals as established under its Spanish-Mexican mineral law.

#### WHAT "COMMON LAW" WAS ADOPTED

By an act of the Congress of the Republic of Texas it was provided:

"That the Common Law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) shall, together with such acts be the rule of decision in this Republic and shall continue in full force until altered or repealed by Congress."<sup>80</sup>

It is clear from the decisions of the Texas courts that the common law considered to have been adopted under this statute is to be determined *as of the time of the adoption of the statute (1840)*, and not

<sup>80</sup> Laws, Rep. of Texas, 4th Cong. 1840, 3 (2 Gammel's Laws of Texas 177). Sec. 2 of this same act referred to above at p. 113, retained the Spanish and Mexican laws relating to the reservation by the sovereign of mines and minerals of every description.

as of 1776, and that the common law as of 1840 is to be ascertained in the light of not merely the decisions of the courts of England but also the decisions in the State and Federal courts of the United States as of that time. *Grigsby v. Reib*, 150 Tex. 597, 153 S. W. 1124 (1913); *Dickson v. Strickland*, 114 Tex. 176, 265 S. W. 1012 (1924); *Walento v. Wolter*, 186 S. W. 873 (Tex. Civ. App. 1916, error ref:).

Speaking of this matter in *Dickson v. Strickland*, the Texas Supreme Court said:

"It is, however, not so much the common law as it may have existed in England, which was adopted by the Act of 1840, as it is the common law of England as understood and declared by the different courts of the United States to which we look in determining a question of first impression in this state."<sup>90</sup>

COMMON LAW AS TO OWNERSHIP OF THE MARGINAL  
SEA AS ADOPTED BY TEXAS

In *Manry v. Robison*, 122 Tex. 213, 229-230, 56 S. W. 2d 438, 445-446, the Texas Supreme Court said:

"Under the English common law the sovereign owned only those portions of riverbeds which were within tidewater limits. . . . in the tide-water sections of navigable streams the King, it is said, owned the rivers, including the beds but held them in trust for the public. . . . This ownership, however, was based, not upon navigability alone, but upon the sovereign's

<sup>90</sup> 114 Tex. at 204, 265 S. W. at 1023.



*ownership of the sea.* Insofar as the tide ebbed and flowed, the rivers were regarded as arms of the sea, and since the King was Lord of the sea, he was proprietor of the land beneath it. . . . such in brief were the English common law rules as to the ownership of riverbeds when we adopted that system of laws as the rule of decision."

This determination by the Texas Supreme Court as to the common law of England and of the United States in 1840 is borne out by an independent examination of the relevant authorities. The most recent authoritative opinion as to the character of the common-law concept of ownership of the bed of the marginal seas as of 1840 is found in the opinion of this Court in *United States v. California*, 332 U.S. 19 (1947), in which the following statement is made concerning the opinion in *Pollard's Lessee v. Hagan*, 3 How. 212 (1845):

"As previously stated this Court has followed and reasserted the basic doctrine of the *Pollard* case many times. And in so doing it has used language strong enough to indicate that the Court *then believed* that states not only owned tidelands and soil under navigable inland waters, but also *owned soils under all navigable waters* within their territorial jurisdiction, *whether inland or not.*"

Numerous English authorities indicate that the English King was understood as having sovereignty as well as ownership over the bed of the adjacent waters of the sea. So Lord Hale said:

"The sea is either that which lies within the body of a county or without. . . . The part of

the sea which lies not within the body of a county, is called the main sea or ocean. The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the King of England, whether it lie within the body of a county or not. . . . In this sea the King of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his Admiral and a right of property or ownership."<sup>91</sup>

Blackstone's Commentaries, the influence of which on the early common law of the American States cannot be exaggerated, said this with reference to islands rising in the sea:

"For, as the King is Lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable that he should have the soil, when the water has left it dry." 2 Blackstone Commentaries, 261-262.

In 1830 Robert Gream Hall said:

"Over the British seas, the King of England claims an absolute dominion and ownership, as Lord Paramount against all the world. Whatever opinions foreign nations may entertain in regard to the validity of such claim, yet the subjects of the King of England do, by the *common law of the realm*, acknowledge and declare it to be his ancient and indisputable right.

"This dominion and ownership over the British sea vested by our law in the King, is not con-

<sup>91</sup> Hale, *A Treatise in Three Parts: Pars Prima, de Jure Maris et Brachiorum Ejusdem*, reprinted in Hargrave's *Law Tracts* (London, 1787) 10-12.

fined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very fundum or soil at the bottom of the sea." Hall, *An Essay on the Rights of the Crown in the Seashores of the Realm* (1830) 2, reprinted in Moore, *History & Law of the Foreshore and Sea Shore* (3rd ed. 1888) 668.

Lord Wynford speaking for the Privy Council in 1829 said:

"The sea is the property of the King, and so is the land beneath it, . . . .

" . . . The laws of England and Jersey [are] precisely the same with regard to land that is below ordinary tide, dealing with such land as a part of the bottom of the sea, and vesting the original right to it in the King." *Benest v. Papon*, 1 Knapp 60, 12 Eng. Rep. 243, 246, 247 (1829).<sup>92</sup>

The same rule was recognized by the Scotch Court of Session as being the common law of England as well as in accord with the civil law in Scotland in *Officers of State v. Smith*, 8 Sess. Cas. (2d ser.) 711, 723 (1846), aff'd *sub nom. Smith v. Earl of Stair*, 6 Bell's App. Cases (House of Lords, 1849), where the question raised was whether the Crown's interest in the shores of the realm was a "right of property" or only a "general guardianship in interest

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<sup>92</sup> This same view was reiterated in *Free Fishers of Whitstable v. Gann*, 20 C.B. (N.S.) 1, 144 Eng. Rep. 1003, 1011, 1012 (House of Lords, 1854), in *Lord Fitzhardinge v. Purcell*, L.R. 2, Ch. 139 (1908) and in *Secretary of State for India v. Chelikani Rama Rao*, 43 Indian App. Cas. 192 (Privy Council, 1916.) \*

over and in the shore, in order to prevent certain public purposes being interfered with." Lord Cockburn in deciding the case in accord with the former view stated:

"I know nothing which I think might be predicated with greater safety or that less requires formal proof, than that the bed of the British seas belongs in property to the British Crown." See *Gammell v. Commissioner of Woods and Forests*, 3 MacQueen's App. Cas. 419, 420 (House of Lords, 1859).

This English common law view as of 1840 was clearly understood by American text writers of the period and was adopted by the courts.

Angell, in his work on *Tidewaters*, published in 1826, said:

"Indeed, in England, the King is regarded as universal occupant, and the presumption is, that all property was originally in the Crown. Hence it is said that all lands are holden mediately or immediately from the Crown, and that the King has the *absolutum et directum dominium*

. . . . .

"To the King, therefore, is not only assigned a sovereign dominion over the seas adjoining the coast, and over the arms of the sea: that in him is also vested the right of property in the soil thereof."<sup>93</sup>

Representative of numerous decisions of this Court which attest that the common law of England

<sup>93</sup> Angell, *The Right of Property in Tidewaters* (Boston, 1826) 17, 18.



prior to 1840 was that the sovereign owned the seabed and subsoil minerals within its marginal belt are *Weber v. Board of Harbor Commissioners*, 18 Wall. 57, 65 (1873), and *Shively v. Bowlby*, 152 U.S. 1, 13 (1894). See also the discussion in *Corfield v. Coryell*, 6 Fed. 546, No. 3230 (E.D. Pa. 1823).

If there was any question about it prior thereto, it is clear that as of 1840, when the Republic of Texas adopted the common law, it was vested with proprietary rights in the seabed and subsoil and that the Texas Supreme Court was correct in so declaring. In any event, its decision as to the meaning and intent of this State statute is binding on this Court. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933); *Federation of Labor v. McAdory*, 325 U.S. 450 (1945).

Therefore, as to this point, defendant respectfully submits that under its domestic law the Republic of Texas was vested with ownership of the seabed and subsoil within its three-league gulfward boundaries and that this ownership was in addition to that which it had in the minerals underlying the area under its special mineral law.

(5) *The Republic of Texas Acquired at Least Those Proprietary Rights in the Area Which the United States Was Said to Have Acquired in the Marginal Belt of the Original Thirteen States in United States v. California.*

Defendant further submits that the Republic of Texas in any event acquired as much title and as many rights to the seabed, subsoil, and minerals

within its three-league gulfward boundary as the United States was said to have acquired in the marginal belt adjacent to the original Union of thirteen States in *United States v. California*. There the Court said:

“That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact . . . and this assertion of national dominion over the three-mile belt is binding upon this court.” (332 U.S. at 33.)

The assertions of national dominion referred to by the Court involved the exercise of governmental powers regulating seal fishing, pollution, anti-smuggling treaties, and the President's Continental Shelf Proclamation. None of them involved an assertion of ownership or an application of domestic property law.<sup>94</sup> The Republic of Texas went much further in its “assertion of national dominion” over the

<sup>94</sup> The Continental Shelf Proclamation of September 28, 1945, was followed by an Executive Order of the same date which reads:

“ . . . Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit.” (486-487.)

A White House release on the same day with the Department of State Bulletin said:

“The policy proclaimed by the President in regard to the jurisdiction over the continental shelf does not touch upon the question of Federal versus State control. It is concerned solely with establishing the jurisdiction of the United States from an international standpoint.” (484.)

three-league belt. The Texas Congress included it within its statutory boundaries and extended thereover its property and regulatory laws; reserved the right of coastal trade in a treaty with England; outfitted and maintained a navy for protection of the area; brought it within the jurisdiction of its maritime courts; and exercised its functions of government and enforced its laws thereover the same as over its upland territory.

It is respectfully urged that these assertions of national dominion by the Republic of Texas over its three-league belt are as binding upon this Court as similar original assertions by the United States with respect to the marginal belt of the original United States.

While the Court did not use the term "ownership" in its opinion in the *California* case, and while it eliminated the words "of proprietorship" from the decree requested by the Attorney General of the United States, its opinion and decree has been and is now being interpreted by plaintiff to include ownership and title.<sup>98</sup>

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<sup>98</sup> This was the interpretation of Mr. Justice Clark, then Attorney General, before the Committee on the Judiciary in 1948. He said:

"They did not limit the rights we had. We had limited them to proprietorship, but the Supreme Court said 'No'; they are greater than proprietorship. Take proprietorship out, and what did they say? 'Possessed of paramount rights in, and full dominion and power over,' they said. In other words, they gave us greater rights than we had put in the decree itself.

"Senator McCARRAN. But refused to say that it was title; and refused to say that the title was in fee simple, notwithstanding the fact that you asked for it.

If this interpretation of the Court's decision by federal officials is correct, then, by the same reasoning employed in the *California* case, the Republic of Texas became the owner of the lands and minerals in controversy through its assertions of national dominion over the area. This ownership having been admitted to be severable from the governmental powers by which it was acquired<sup>97</sup> and not having been transferred by the State to the United States, the ownership remains in the State of Texas. As said in Dr. Charles Cheney Hyde's interpretation of the Texas Annexation Agreement,

"It is believed to be reasonable to declare that when Texas entered the Union, it surrendered only its governmental powers of national sov-

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"Mr. CLARK. They said this. You can have an injunction; you do not get injunctions unless you have got some rights and got some power. You have got some title.

"Senator DONNELL. Did you consider included in 'paramount rights in and full dominion and power over,' quoting the Court's language, that it included fee simple title?

"Mr. CLARK. Definitely so. The definitions that I have looked up on those terms certainly include ownership, most perfect ownership." Joint Hearings Before the Committees on Judiciary, 80th Cong., 2d Sess., on S. 1988 and Similar House Bills, February-March, 1948, 624-625.

Solicitor General Perlman also testified that the rights are based upon title. He said:

"Well, of course, it rests on the claim of title. If we had no title, we are not entitled to it." Hearing before the Committee on Interior and Insular Affairs, *supra*.

<sup>97</sup> See footnotes 10 and 11 and p. 8, *supra*. Also see discussion of severability of ownership and sovereignty by Dean Pound at p. 1 of Memoranda and Appendix.



ereignty—not its lands or rights of substance theretofore acquired by its own use of those powers. These rights of substance that Texas had acquired were distinct and therefore separable from the paramount governmental powers originally employed in making the acquisition. In a word, the Texan rights of substance did not pass to the United States by transfer of those governmental powers of national sovereignty. Again it should be noted that these rights of substance were not ceded to the United States by the annexation agreement. . . .<sup>98</sup>

If the interpretation by federal officials of the meaning of the *California* decision is incorrect and the Court only intended to decree to the United States governmental powers of regulation and control, as some have argued by reason of its elimination of "propriatorship" from the decree and by reason of certain language in the Court's opinion in *Toomer v. Witsell*, 334 U.S. 385, 402, then plaintiff is in no event entitled to judgment enjoining the State of Texas from its actions in the area. Congress has not entered the field but has left it as completely to the State as it had left the regulation and control of fishing to the State of South Carolina.<sup>99</sup> This is developed under II F *infra*.

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<sup>98</sup> Charles Cheney Hyde, Memorandum on *United States v. Texas*, Appendix, p. 16.

<sup>99</sup> See *Toomer v. Witsell*, *supra*, p. 393, and *Manchester v. Massachusetts*, 139 U.S. 240, 266.

- b. **The Ownership and Proprietary Rights of the Republic of Texas in These Lands and Minerals Were Not Ceded to the United States by the Annexation Agreement**

*Legal Nature of the Agreement*

The Annexation Agreement is a legislative compact between the United States and the Republic of Texas and is of the same nature and has the same effect as a treaty.<sup>100</sup> President Tyler, in a letter of instructions to the United States' negotiator, Andrew J. Donelson, said:

"By whatever name the agents conducting the negotiations may be known, whether they be called commissioners, ministers, or by any other title, the compact agreed on by them in behalf of their respective governments would be a treaty, whether so called or designated by some other name. The very meaning of a treaty is a compact between independent States founded on negotiation."<sup>1</sup>

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<sup>100</sup> See Washburn, "Legislative Compact with Foreign Nations," 55 Am. L. Rev. 68, 84 (1921), where it is said that although this type of formal compact and a treaty are "unlike" in their nature and form. . . the result accomplished may be the same."

<sup>1</sup> That this was the concept accorded to the Agreement by other persons most intimately connected with it is shown by the following remarks made in the House of Representatives on January 9, 1845, by Mr. Brengle:

"This is a treaty. The calling it a joint resolution, or anything else, does not make it the less a treaty. It has all the characteristics of a treaty. The parties to it are two sovereign States. The object intended to be effected is to be done by the mutual consent and agreement of both, and it is made for the public welfare of both." Appendix to Cong. Globe, 28th Cong., 2d Sess. 85.

The perpetual character of compacts of this type is stated in Wheaton, *International Law* (5th ed. 1916), as follows:

“General compacts between nations may be divided into what are called transitory (*dispositive* or *executed*) conventions, and treaties properly so termed (sometimes called *executory* conventions). The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties. . . . Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favour of one nation within the territory of another.” (368.) (*Italics his.*)

The Annexation Agreement, admitted by plaintiff to be “controlling,” governs the subsequent relations of the United States and Texas. It continues, therefore, to be the “measure and rule of the rights” of each, as shown by the following statement of Vattel in his 6th American edition, published in 1844, during the time of the negotiations for annexation:

“. . . a nation . . . may lawfully subject itself to a more powerful nation on certain conditions agreed to by both parties: and the compact or treaty of submission will thenceforth be the measure and rule of the rights of each. For since the people who enter into subjection resign a right which naturally belongs to them, and transfer it to the other nation, they are perfectly at liberty to annex what conditions they

<sup>2</sup> Brief for the United States, p. 15.

please to this transfer; and the other party, by accepting their submission on this footing, engages to observe religiously all clauses of the treaty."

Vattel also gives a rule for the subsequent interpretation of an agreement of this nature as follows:

*"Whatever tends to change the present state of things is also to be ranked in the class of odious things: for the proprietor cannot be deprived of his right, except so far, precisely, as he relinquishes it on his part; and in case of doubt, the presumption is in favour of the possessor. . . . Here also may be applied, in many cases, the rule we have mentioned in Section 301, that the party who endeavours to avoid a loss, has a better cause to support than he who aims at obtaining an advantage."* Vattel's *Law of Nations* (Chitty's ed., 1834), 265. (Author's emphasis.)

(1) *Background, history, and Rules of Interpretation.*

The Annexation Agreement being a compact in the nature of a treaty or contract between independent nations, the rules applicable to treaties, conventions, and other international agreements apply.<sup>3</sup> Plaintiff admits the applicability of these rules by frequently relying upon them in its argument on the interpretation of the Annexation Agreement.<sup>4</sup>

<sup>3</sup> See Ralston, *The Law and Procedure of International Tribunals* (1936) 5.

<sup>4</sup> The government bases its construction of the Annexation Agreement upon "the joint purpose of Congress and Texas" (p. 29), the "practical construction, by the state itself" (p. 33), "The party's purpose" (p. 12), or "fundamental aims" (p. 29).



The purpose of the interpretation of an agreement of this nature is to discover the understanding and intention of the parties at the time the contract or agreement was entered into.<sup>5</sup>

Negotiations for the annexation of Texas began with the preparation of the subsequently unratified treaty<sup>6</sup> in which the Republic of Texas offered to cede to the United States "all the territories of Texas, to be held by them in full property and sovereignty." (Article I.) This cession was to include

"all public lots and squares, vacant lands, mines, minerals, salt lakes and springs, public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms, armaments, and accoutrements, archives and public documents, public funds, debts, taxes and dues unpaid at the time of the exchange of the ratifications of this treaty."

In return for this cession, the United States was to "assume and agree to pay the public debts and liabilities of Texas . . . at the time of annexation. . . ." (Article V.)

One of the main reasons for the failure of the United States Senate to ratify the original annexation treaty on June 8, 1844, was that many of the

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<sup>5</sup> *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929); *Ross v. McIntyre*, 140 U.S. 53, 457 (1891); *Santovino v. Egan*, 284 U.S. 30, 38 (1931); *Clark v. Allen*, 331 U.S. 503, 513 (1947); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *United States v. Texas*, 162 U.S. 1, 36 (1896); *Tucker v. Alexandroff*, 183 U.S. 424, 436-437 (1902); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928).

<sup>6</sup> Appendix, p. 51.

members of the Senate were unwilling for the United States to assume the debts and liabilities of the Republic of Texas in exchange for its "worthless lands." Other Senators, unwilling for the United States to assume Texas' debts, stated that Texas should keep its lands to pay its own debts.\* The treaty was defeated by a vote of 35 to 16.

However, the question of annexation was kept open with the government of Texas, and it became one of the greatest political issues of the day, with Polk winning the Presidency on a platform which called for annexation of Texas. After the election of 1844, the second session of the same Congress that had rejected the original treaty of annexation made a counter proposal to Texas whereby it would retain its lands and assume its own debts. The counter proposal was adopted in the form of a Joint Resolution March 1, 1845. The main objection of the United States Senate to the original unratified treaty was not present in the Joint Resolution. It is this agreement which controls and which must be interpreted by this Court in determining the rights of the United States and Texas.

In ascertaining the intention of the parties to this agreement, recourse must be had to "the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to

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\* Appendix to Cong. Globe; 28th Cong., 1st Sess. 686; Appendix to Cong. Globe, 28th Cong., 2nd Sess. 275.

\* Cong. Globe, 28th Cong., 2nd Sess. 184; Appendix to Cong. Globe, 28th Cong., 2nd Sess. 121, 143, 150, 195, 213, 234, 402.

their own practical construction of it." *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933).<sup>9</sup>

Plaintiff's theory of the case against Texas' defenses calls for the consideration of extrinsic evidence in ascertaining the intention of the parties to the Annexation Agreement. Plaintiff does this by basing its brief on its own erroneous factual interpretation of the intention of the parties to the Annexation Agreement.<sup>10</sup> Had the Court known that plaintiff would base its entire case on disputed issues of fact concerning the intention of the parties to the Annexation Agreement, it is probable that defendant's pending motion for the appointment of a special master would have been heretofore granted. This is indicated by the practice of the Court in the past, which was the subject of the following discussion by Mr Hyde:

"The Supreme Court is not disposed to forbid recourse to, or to decline itself to rely upon, diplomatic exchanges or correspondence indicating the views of negotiators of a treaty, of which the interpretation is uncertain. The fact of uncertainty is seemingly regarded as made apparent by the divergency of views of opposing litigants, notwithstanding the form of the text. The Court has not sought to postpone consideration of such evidence until, after exhausting other modes or processes of interpretation, it

<sup>9</sup> *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Clark v. Allen*, 331 U.S. 503, 513 (1947); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); *Ross v. McIntyre*, 140 U.S. 453, 475 (1891); *Terrace v. Thompson*, 263 U.S. 197, 223 (1923); *United States v. Texas*, 162 U.S. 1, 23 (1896); *Pigeon River Improvement, Slide & Boom Co. v. Cox*, 291 U.S. 138, 158 (1934).

<sup>10</sup> See p. \_\_\_\_\_, *supra*.

still remains itself in doubt. Thus it has not been wary of utilizing such data in order to supplement or support conclusions to be drawn from the face of an instrument, or as a means of establishing others at variance with a meaning seemingly deducible from its terms. The significant thing is the readiness with which the Court turns to such forms of preparatory work as reasonable and applicable sources of interpretation."<sup>11</sup>

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The examination of all the available evidence in determining the intention of the parties to a compact or agreement of this nature is recognized by the foremost authorities on the interpretation of treaties as the only proper way to ascertain correctly the intention of the parties.<sup>12</sup> He says that the preparatory work should be heard by the court interpreting the treaty or agreement.<sup>13</sup>

With this in mind, the State presents here only enough to show that plaintiff is not entitled to judgment as a matter of law; that disputed issues of fact necessary to a determination of the intention of the parties have been raised; and that the State should be given the opportunity to present all of its evidence bearing on this intention.

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<sup>11</sup> II Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed. 1945) 1482.

<sup>12</sup> Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 Harv. L. Rev. 549, 573 (1935).

<sup>13</sup> *Id.* at 552, note 3.



(2) *All property to be ceded to the United States was specifically named, and this enumeration did not include the lands or minerals here in controversy. All other property remained in the State of Texas.*

Paragraph 2 of the Joint Resolution of the Congress of the United States, March 1, 1845, provides that

“ . . . said state, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said republic of Texas, shall retain . . . .” (Appendix, p. 58.)

It is clear from this language that the Agreement itself was not a present cession of property to the United States. The parties contemplated that after the State was admitted into the Union it was to cede to the United States certain property therein specified. These cessions were not to be made by the *Republic* before it could be admitted into the Union, but by the *State* “when admitted into the Union.”

That this was the intention of the parties is borne out by the subsequent interpretation of this particular provision by both parties. For example, Article 13, Section 8, of the Constitution of the State of Texas (1845), adopted “in accordance with the provisions of the Joint Resolutions for annexing Texas to the United States,” which was accepted and ap-

proved by the Congress of the United States in the Joint Resolution for the admission of the State of Texas into the Union, December 29, 1845, provided:

"The Legislature shall also adopt such measures as may be required to cede to the United States, at the proper time, all public edifices, fortifications, barracks, ports, harbors, navy and navy yards, docks, magazines, arms and armaments, and all other property and means pertaining to the public defence now belonging to the Republic of Texas. . . ."<sup>14</sup>

On March 26, 1846, the legislature of the State of Texas passed an act

"Authorizing the Governor of the State of Texas to cede and transfer to the United States all of the property of what description soever embraced in and contemplated by the joint resolution of both Houses of the Congress of the United States, approved 1st of March, 1845, and the 8th section of the 13th article of the Constitution of the State of Texas."

The provisions of this Act are as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas, That the Governor thereof be, and hereby is, authorized and fully empowered to cede, transfer and deliver over to the United States, or any agent or agents by them appointed, by such instrument, in writing or other means, as he may deem proper and necessary, all the public edifices, fortifications, barracks, ports and harbors, navy and navy yards,

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<sup>14</sup> 2 Gammel's Laws of Texas 1300-1301.

docks, magazines, arms and armaments, and all other property and means, pertaining to the public defence, belonging formerly to the Republic, now the State, of Texas.”<sup>15</sup>

In a letter transmitting a copy of this act to President Polk, Governor Henderson said:

“I have the honor herewith to transmit to you a copy of an act passed by the Legislature of the State of Texas authorizing the Executive to transfer to the United States, in pursuance of the provisions of the Joint Resolutions of the United States Congress under which Texas has been annexed, all the public edifices and other public property pertaining to the public defence and also a copy of an act authorizing the Executives of the State to transfer to the United States all custom houses & other public buildings belonging to the State and use by the officers of the Republic in the collection of customs, upon such terms as may be agreed upon. *I am ready on the part of the State to carry out the objects of the two acts referred to and beg to be informed what manner you propose to receive the property embraced in the said Joint Resolution and whether the Government of the United States wishes to obtain the property embraced in the last Act referred to above. . . .*”<sup>16</sup>

Officials of the United States government adopted without question the same interpretation accorded by Texas officials to the clause in the Joint Resolu-

<sup>15</sup> Acts, 1st Leg., 1846, 23; 2 Gammel's Laws of Texas 1331-1332.

<sup>16</sup> Henderson to Polk, April 4, 1846, Miscellaneous Letters, April-June, 1846, MS National Archives.

tion providing for the cession of property by the State of Texas to the United States. Shortly after the annexation of Texas, Secretary of State Buchanan requested an appropriation to provide funds for a commissioner of the executive department to go to Texas.

“to receive this property, and take care that it *shall be* properly cedéd to the United States, according to the spirit and terms of the Joint Resolution for annexing Texas to the Union.”<sup>17</sup>

Such a bill was introduced and passed in the House of Representatives on February 4, 1846. This Act provided:

“That the sum of three thousand dollars is hereby appropriated, . . . for the purpose of the defraying any expenses which may be incurred in obtaining from the State of Texas the cession of the public properties specified in the second section of the joint resolution for annexing Texas to the United States, and in the eighth section of the thirteenth article of the constitution of that State, in receiving the transfer of the same, and placing it in the custody of the appropriate agents of the Treasury, War, and Navy Departments, respectively.”<sup>18</sup>

When this bill reached the Senate, the following amendment was offered:

“That, whenever the President of the United States shall receive official information that the the State of Texas is ready to *cede* to the United

<sup>17</sup> Buchanan to McKay (Chairman of Committee of Ways and Means), Feb. 3, 1846, R. G. 59, General Letters of the Dept. of State, Domestic Letters, 35 MS National Archives.

<sup>18</sup> Cong. Globe, 29th Cong., 1st Sess., 308-310.



States the public property lately belonging to the republic of Texas, and which by the terms of the joint resolution for the annexation of that republic to the Union, and by the thirteenth article and eighth section of the constitution of Texas, is *to be ceded* and surrendered to the United States, he be, and hereby is, authorized to cause a suitable officer of the army of the United States, not under the rank of captain, to receive from the proper authorities of Texas possession of all the fortifications, barracks, magazines, arms and armaments, and ordnance of every description, pertaining to the military arm of public defence; and in like manner to cause a suitable officer of the navy of the United States, not below the rank of commander, to receive from the proper authorities of said State of Texas all the ships and vessels of war, navy-yards and dock-yards, ports and harbors, arms, armaments, and ordnance, *pertaining to the naval arm of the public defence*; and that he, in like manner, cause the officers of the customs of the United States in Texas to receive from said authorities all the custom-houses, and other places and property for the collection of the revenue, which, by said joint resolution, are *to be ceded* and surrendered to the United States.

"Sec. 2. And be it further enacted, That the President cause an exact inventory of all the property, of every description, so ceded and surrendered, to be laid before Congress as early after the said service is complete as is practicable.

"Sec. 3. And be it further enacted, That it shall be the duty of the Attorney General of the United States to examine into the title of the property so ceded and surrendered, and to pre-

scribe such forms of grant and conveyance as may be requisite to vest a good title thereto in the United States.”<sup>19</sup>

Further evidence on this subject relates to actual cessions of property which occurred after, and only after, annexation. This evidence is contained in county deed records, records of the General Land Office of Texas, the National Archives, State Archives and similar places.

#### PORTS, HARBORS, AND DEFENSE

One of plaintiff's most distorted factual conclusions is contained in its assertion that the parties intended that all of Texas' ports and harbors were to be ceded to the United States (plaintiff's brief, p. 2), and that they—"contiguous to, and merging with, the marginal sea—were to pass to the United States because of their importance to the national security." (p. 13.)

In the first place, the above Senate amendment prepared by executive officials shows that only ports and harbors then connected with, and forming part of, navy installations were intended to be ceded. Our evidence will show they were the harbors and slips connected with the navy yards and forts, *then used* by the Republic in the public defense. No other ports, harbors, waters, or submerged lands were intended to pass. This is shown by the interpretation in the Senate amendment quoted above, which calls for "ports and harbors, arms, armaments, and ordnance, *pertaining to the naval arm of public defence.*"

<sup>19</sup> H. R. 180, Records of 29th Cong., 1st Sess., MS, National Archives.

Equally important, we can show that representatives of the United States were appointed to inventory and receive the property intended to be ceded. We have the inventories, and they do not cover any of the land in controversy or any ports or harbors except those attached to and a part of 1845 defense installations.

There are two letters which illustrate the nature of a vast amount of evidence which will show that all property to be ceded by Texas to the United State was listed and ceded after annexation and that no other property was asked for or intended to be covered by the agreement.

The following letter was addressed to H. G. Cook by Governor Henderson of Texas:

"You will confer a favor upon the Executive by making out and handing to him a list of the public property which is still under your charge as Secretary of War & Marines of the Republic of Texas and also a description of its condition & location. Confining the same to the description of property contained in the Joint Resolution of the U. S. Congress under which Texas has been annexed to the United States."<sup>21</sup>

Similarly, Col. H. G. Runnels, the United States collector of customs of Galveston, wrote Secretary of the Treasury Walker in Washington:

"Soon after the receipt of your letter of the 25th of March instructing me as agent for the U. S. to receive and receipt for all public prop-

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<sup>21</sup> Henderson to Cook, April 20, 1848, Governor's Collection, MS, State of Texas Archives.

erty to be transferred by the State of Texas, to the United States, I proceeded to Austin for the purpose of complying with your instructions, and have as far as practicable done so. I have the honor herewith to transmit, duplicate lists of such property as has been transferred to me—the property at the Austin Arsenal described in the inventory marked A. I left in possession of Mayor Beall of the United States Army as per his receipt.

“The property at the Houston Arsenal described in Inventory marked B. I left in possession of B. O. Payne, Captain of Texian Ordnances, it being the best that I could do for the presentation of the property until other disposition be made. The Navy and Naval property described in Inventory C, I have left in charge of Lieutenant W. A. Tennison of whom I received it, until other disposition be made.

“Lieutenant C. P. Kingsbury of the Ordnance Corps, has been instructed by the Secretary of War, to receive from me and receipt for all the military property that I may hand over to him.”<sup>22</sup>

These inventories and other evidence show that only property of the same nature and type as that specially set forth which was owned by, and devoted to the public defense of, the Republic of Texas at the time of annexation was to be ceded and that it was not intended that any other property be ceded.

From this will follow that property later declared to pertain to the public defense would not come with-

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<sup>22</sup> Runnels to Walker, May 15, 1846, Records of the Dept. of the Navy, Naval Records Collection of the Office of Naval Records and Library, Miscellaneous Letters Received, July, 1846, MS, National Archives.



in the cession to be made. As said by the Court in *Strother v. Lucas*, 12 Pet. 410, 438, 446 (1838):

“The terms of a treaty are to be applied to the state of things *then existing*.”

“The United States must remain content with that which ~~contended~~ them at the transfer.”

*contented*

(3) *Mines and Minerals were clearly excluded from the cession.*

The separate ownership by the Republic of Texas of mines and minerals<sup>23</sup> was recognized by the United States in the unratified treaty for annexation, which provided for the cession by Texas of all its territory to the United States, “including vacant lands, mines, minerals,” etc. Mines and minerals were thus enumerated separately from lands. In practically all of the many drafts of the Joint Resolution by the United States Congress, “mines and minerals” were again enumerated for cession to the United States. However, the phrase “mines and minerals” was stricken from the resolution before final passage in the House, and its omission was specifically noted with apparent approval in the Senate.<sup>24</sup> From this it

<sup>23</sup> See discussion of this separate ownership on p. 112-124, *supra*.

<sup>24</sup> The drafts of the joint resolution providing for the cession of “mines and minerals” to the United States are found in the Cong. Globe, 28th Cong., 2d Sess., on the following pages: (1) Resolution by Mr. Ingersoll (p. 26); resolution by Mr. Douglass (p. 65); resolution by Mr. Tibbetts (p. 76); amendments of Mr. Douglas (p. 85); resolution by Mr. Brown (p. 129); resolution by Mr. Burke (p. 140). Mr. Brown on January 13, 1845, introduced a resolution which was identical to his resolution which was finally adopted, except that the wording “all mines, minerals, salt lakes and

is clear that they were not to be ceded to the United States, but were to be retained by the State.

“springs” was included in the list of enumerated properties to be ceded by Texas to the United States (Cong. Globe, 28th Cong., 2d Sess. 129). These words were eliminated in the substitute draft offered by Mr. Brown and adopted on January 28, 1845 (Cong. Globe, 28th Cong., 2d Sess. 193).

The action on the floor of the House was as follows: Mr. Ingersoll had offered a “joint resolution for annexing Texas to the United States.” Article I, providing for cession of properties to the United States, contained these words:

“This cession including all public lots and squares, vacant lands, *mines, minerals, salt lakes and springs.*” (Cong. Globe, 28th Cong., 2d Sess. 191-92.)

Several substitutes were offered and rejected, the last being that of Mr. Burke. It was substantially the same as the substitute next offered by Mr. Brown and finally adopted, except that its provision for cession of property to the United States also included the “mines, minerals, salt lakes, and springs.” (Cong. Globe, 28th Cong., 2d Sess. 192-93.)

Immediately after Mr. Burke’s substitute was defeated, Mr. Brown offered his substitute, which was substantially the same as the defeated Burke resolution except that the provision for cession of property to the United States eliminated the words “mines, minerals, salt lakes and springs,” and it was adopted.

The omission of “mines and minerals” was specifically noted when the House resolution was pending in the Senate, as evidenced by the following excerpts from the Senate debate reported in the Appendix to the Cong. Globe, 28th Cong., 2d Sess. 389:

“Mr. Dayton. But, sir, I desire now to submit a few remarks in reference to the other sections of this resolution. The second session provides for the cession to the United States of all the ‘mines, minerals,’ etc. . . .”

(Mr. Walker here rose and said he thought that it had been finally stricken out in the House. He at length found the resolution as amended, which did not contain it.)

“Mr. Dayton. I am glad it is so, though I was not aware of it. I used the printed resolution I found on my table and was not aware that its provisions had been altered.”

(4) Retention of "vacant and unappropriated lands within its limits" confirms the construction that lands and minerals in controversy were not intended to be ceded, but were actually retained by the State.

It was agreed, one hundred and five years ago, that Texas, when admitted into the Union, ". . . shall also retain all the vacant and unappropriated lands lying within its limits. . . ." (Second Provision, Joint Resolution, Appendix p. 59.) Plaintiff treats this provision as a reservation and attempts to apply a narrow and limited interpretation to its words. (plaintiff's brief, p. 13.)

The provision is not a reservation, but an express retention. It is therefore not to be construed strictly, as in derogation of a grant, but broadly to accomplish the intent of the parties. Plaintiff admits that the language is subject to more than one construction. Plaintiff's brief sets forth various evidentiary matters to support its interpretation that the terms were not intended by the parties to cover the submerged lands in controversy. (plaintiff's brief, pp. 22-25, 65-67.) No doubt plaintiff would have been contending for the broad and plain meaning of the term if "vacant and unappropriated lands" had been ceded by Texas to the United States, rather than retained by Texas, for that is exactly the position which plaintiff took in respect to the words "public lands" in *United States v. California*.

The argument of the United States in the *California* case with respect to "public-lands" was di-

rectly opposed its present argument.<sup>25</sup> Against California, it contended that the marginal sea was reserved to the United States by the provision in the admission act that the State

"shall not interfere with the primary disposal of the public lands within its limits."

Attorney General Clark urged that

"Congress expressed an intent, and, in effect, provided that the title to all such lands be reserved to the United States."

Referring to the same cases cited on page 31 of their brief in this case,<sup>26</sup> the United States said that "prior decisions with respect to general legislation involving the disposition of 'public lands' appear to hold that the term 'public lands' does not include tidelands." However, it was argued by the United States that

"There are no decisions of this Court extending that interpretation to the statutory provision here involved as applied to the three-mile belt, and it may be doubted whether such extension should be made since the rule of those decisions does not appear to have any support in the legislative history of the foregoing statutory provision."

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<sup>25</sup> Brief of the United States in Support of Motion for Judgment, *United States v. California*, No. 12, Original, October Term, 1946, pp. 61-63.

<sup>26</sup> *Borax, Lt'd. v. Los Angeles*, 296 U.S. 10, 17; *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284; *Newhall v. Senger*, 92 U.S. 761-763.



To aid in distinguishing the phrase as used in the Admission Act from its use in statutes for disposal of public lands to private persons, the United States went into the circumstances of admission saying that

“such meager materials as are available with respect to the 1850 Act admitting California seem to point to the contrary conclusion.”

In discussing the evidence that seemed to point to such “contrary conclusion,” the Government referred to the bill which became the Act of Admission and to the report of the committee on that bill, wherein it was said that “the right of the United States to the public domain and *other public property in California*” was to be left “incontestable.” (Italics supplied by the United States.) From this, the Government concluded that:

“Thus the report speaks of public domain and *other public property*, a descriptive term so sweeping as to include submerged lands owned by the United States.” (Italics theirs.)

Against Texas, admitted into the Union only five years before California, the United States now says that

“... the phrase ‘vacant and unappropriated lands’ was regarded as the equivalent of the more usual term ‘public lands,’ and this Court and the Texas courts have long held that the latter term normally does not include tidelands

or submerged lands, but only fast land subject to disposition or sale under the general land laws,"<sup>27</sup>

and that

" . . . it is highly unlikely that the simple reservation of 'vacant - and unappropriated lands' was designed to cover the significant area now in dispute."<sup>28</sup>

When, as in California, the reservation of "public lands" was in favor of the United States, plaintiff urged this Court to rule that the term was "so sweeping as to *include* submerged lands." The Government now argues that the term "vacant and unappropriated lands," which it says is the equivalent of "public lands," does *not include* submerged lands.

The cases cited by plaintiff for the principle that the term "public lands"<sup>29</sup> does not include submerged lands clearly are not applicable to the present case. They merely embody the principle that the words "public lands" are strictly construed when used in general statutes authorizing grants or sales to individuals for private purposes. The power of Texas to make grants or sales of public lands, though submerged, has been upheld since the days of the Republic, and has many times been exercised. The rule of the cases cited by plaintiff has no application to direct legislative grants, treaties and other similar agreements by a State acting as a sovereign.

<sup>27</sup> Brief of the United States, p. 12.

<sup>28</sup> *Id.* at 13.

<sup>29</sup> Brief of the United States, p. 31.

In agreements of this type the parties "are free to employ words in any sense they choose." Jessup, *A Modern Law of Nations* (1948) 138.

In *The Bello Corrunes*, 6 Wheat. 152, 171-172 (1821), the Court said that

"This court would not readily lean to favor a restricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract as well as a law."

For this reason, these agreements "are to receive a fair and liberal interpretation according to the intention of the contracting parties." 1 Kent, *Commentaries on American Law* (1826) 174; *Valentine v. United States*, 299 U.S. 5, 10 (1936); *Bacardi v. Domenech*, 311 U. S. 150, 163 (1940); *Todok v. Union State Bank*, 281 U.S. 449, 452 (1930); *Asakura v. Seattle*, 256 U.S. 332, 342 (1924); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1880); *Chew-Heong v. United States*, 112 U.S. 536, 539 (1884); *Shanks v. Dupont*, 3 Pet. 242, 249 (1830).

The intention of the parties is to be determined "in the light of the conditions and circumstances existing at the time" the agreement was "entered into, with a view to effecting the objects and purposes of the States thereby contracting." *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912); *Ross v. McIntyre*, 140 U. S. 453 (1891).

Even without the aid of the rule of liberal construction, the term "vacant and unappropriated" lands, as understood in 1845, was broad enough to include submerged lands.

*Mobile v. Eslava*, 16 Pet. 234 (1842), involved the title to certain submerged lands in Mobile Bay. The new state of Alabama had been erected out of grants of "waste and unappropriated" lands made by several of the old states. Plaintiff argued that "by the compact between the United States and Alabama, on her admission into the Union, it was agreed that the people of Alabama forever disclaimed all right or title to waste and unappropriated lands lying within the State. . . .", Mr. Justice Catron there said that the term

"waste and unappropriated lands . . . embraces lands under water as emphatically as those not covered with water. . . ." 16 Pet. at 254.

*Pollard v. Hagan*, 3 How. 212 (1845), also involved submerged lands in Mobile Bay. The Court, in discussing the right of the United States to these lands, said that

"This right originated in voluntary surrenders, made by several of the old States of their *waste and unappropriated* lands to the United States. . . ." 3 How. at 224.

The case of *Attorney General v. Chambers*, 4 De G. M. & G. 486 (1854), involved the limit of Crown ownership of submerged lands, which was decided only eight years after the annexation of Texas. Lord Chancellor Cranworth used the expression "unappropriated soil" to refer to land below the sea. His observation is quoted by Mr. Chief Justice Hughes in the tidelands case, *Borax, Lt'd. v. Los Angeles*,



296 U.S. 10, 25 (1935). See also *Costas v. Phillipine Islands*, 221 U.S. 623 (1910) wherein this Court referred to submerged land of Manila Bay as "public land," and distinguished the property interest therein from sovereignty.

More recent cases show that the term "public land" or "lands" frequently includes submerged lands. For example, in *Hymes v. Grimes Packing Co.*, 337 U.S. 86 (1949), the Court held that "public lands" as used in a statute authorizing the Secretary of the Interior to designate as an Indian reservation any area of land which had been reserved for use and occupancy of Indians or Eskimos by prior statute, together with additional "public lands" adjacent thereto within the territory of Alaska, or any other "public lands" actually occupied by Indians or Eskimos, did not refer only to land above low tide, but could be interpreted to include coastal waters.

"The body of lands known as Annette Islands" was held to include surrounding waters as well as the upland in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). In reaching this conclusion, the Court considered the circumstances under which the reservation was created and the fact that the statute had been always treated as reserving the adjacent fishing grounds as well as the upland.

Plaintiff does not undertake to examine the legal meaning in 1845 of the expression "all of the vacant and unappropriated lands lying within its limits." It urges, however, on the basis of intention, that the marginal sea "is not within the class of 'vacant and unappropriated lands,'" because (1) the sole pur-

pose of the reservation was to give Texas the means to pay off its debt and (2) the expression "vacant and unappropriated lands" is equivalent to "public lands," which were not subject to sale to pay the debt.

Under the first point, the Government states (plaintiff's brief, p. 23): "The lands contemplated were obviously those which were suitable for sale and disposal for sums which would reduce the Republic's debt. . . ." This statement is not convincing; indeed, it is not even persuasive. The purpose of the Annexation Agreement was not to provide Texas with "the means of liquidating the Republic's liabilities" (p. 29), since Texas already owned the means in question; on the contrary, the intent of the Agreement was that, since the United States refused to assume the liabilities of the Republic, it should have no claim to Texas' assets, excepting only the defense properties expressly ceded. Indicative of the distinction is the fact that the State was to keep not only the vacant and unappropriated lands, to be applied to the payment of its public debt, but also "the residue of said lands, . . . to be disposed of as said State may direct." The latter provision is obviously incompatible with the idea that the sole purpose of the retention was to enable the State to discharge its debt. Actually the suitability of the lands for sale was of no concern to the parties. All the Texas lands had been branded the year before as "worthless" in the United States Senate, and that body refused to take them in exchange for assumption of the Texas debt. Also, the Government's argument would fail because the lands were and have been subject to appropriation and sale. Our evidence

will show that persons in Texas considered the submerged lands of the Gulf as valuable as some of the West Texas uplands prior to 1845.

The Government's argument that vacant and unappropriated lands were considered the equivalent of public lands and thus are confined to lands above ordinary high tide, likewise finds no support. The Government cites absolutely no basis for its conclusion.<sup>30</sup>

Although the sedentary fisheries represented one of the earliest uses made of the seabed and subsoil, defendant's evidence will show knowledge and use of petroleum along the Texas and Mexico coasts and many other uses of the lands and minerals prior to 1845. This evidence can be confirmed by the testimony of aged witnesses who in later years saw, and scientifically tested, petroleum at the very places where it had earlier been described by historians. Defendant's motion to take the oral depositions of these witnesses in order to preserve their testimony is still pending before this Court.

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<sup>30</sup> The Government's point (page 33) that the State Land Commissioner in certain reports on the State's public domain did not include lands under the Gulf until recent years is, of course, of no consequence. It is completely irrelevant upon the question of intention of the parties. Since the State General Land Office was not authorized to sell or lease submerged land until comparatively recent years, it is natural that such lands should not be included within the tabulation. (Previously they were sold or leased only by direct legislative acts.) If this is a proper indication of intention or non-ownership, then plaintiff is immediately foreclosed, because the evidence will show that the United States has never in 105 years listed the land in question as part of the nation's public domain.

Defendant has additional cases and evidence which it will offer on this point on the merits. Enough has been said to show beyond dispute that the term "vacant and unappropriated" land could have been used by the parties to mean exactly what it says, thereby applying to all lands "lying within its limits." Plaintiff has made a fact issue of the intention of the parties in their use of the term, and defendant is entitled to develop the evidence fully on this and other fact-issues in the case.

Also, contrary to the impression sought to be left by the United States, the title of Texas to the lands and minerals within three leagues of its coast does not rest solely on the meaning of "vacant and unappropriated lands." Texas did not convey its territory to the United States, with a reservation, but on the contrary, like the United States in the *California* case, Texas is the sovereign of the soil within her boundaries and the United States obtained only those property rights transferred to it by the State of Texas. As already shown, the only cessions agreed to be made by the Republic after its admission as a State did not include the lands and minerals within the three-league belt. There being no grant of these lands and minerals to the United States, the State of Texas retained them.

(5) *The "defence," "equal footing," "boundary adjustment," "proper territory," and national sovereignty provisions, referring only to governmental powers, show no intention of enlarging the cession of property to be made to the United States.*



Plaintiff does not contend that these provisions in the Annexation Agreement amounted to a transfer of property rights as a matter of law, or that they are inseparable from the governmental powers mentioned. It refers to them only as indicative of the intention of the parties to include the controverted lands and minerals in the cessions to be made to the United States, or at least to restrict the State's retention of "lands lying within its limits" to uplands. Point II D (pp. 65-68) of the Government's brief is directed wholly to interpreting the Annexation Agreement. Point II B (pp. 52-63) likewise is based on the intention of the parties to the agreement, since plaintiff assumes in its argument on succession and sovereignty that the lands and minerals in question were not retained by the State as "vacant and unappropriated lands." (See notes 28 and 29, p. 54, plaintiff's brief.) In other words, plaintiff admits that if Texas retained these lands and minerals upon annexation, succession and sovereignty do not affect the present status of ownership by the State.

#### THE "DEFENSE" CLAUSE

As already shown, the agreement by Texas to cede "to the United States, all public edifices, fortifications, barracks, ports and harbors, navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to the Republic of Texas" was not a cession to the United States of the lands and minerals under the marginal sea. See discussion, *supra*, pp.

143. Instead of supporting an interpretation against retention of the lands under the Annexation Agreement, it strengthens the contrary view. All properties intended to pass for defense purposes were later inventoried for deeds of cession, titles approved by the Attorney General, and the whole transaction closed, as will be shown by the evidence of which plaintiff is apparently unaware.

#### THE "EQUAL FOOTING" CLAUSE

In the *California* case, the Attorney General of the United States contended that

"... the equal footing rule is inapplicable because the concept of ownership as an attribute of sovereignty within the meaning of the equal footing clause is unsound and should not be extended to the marginal sea."<sup>31</sup>

Attorney General Clark, in his article "National Sovereignty and Dominion Over Land Underlying the Ocean," wrote:

"As has been indicated, the powers and rights so reserved to the original States, and vested in the subsequently admitted states under the 'equal footing' clause, are political and not proprietary in character."<sup>32</sup>

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<sup>31</sup> Brief for the United States in Support of Motion for Judgment, *United States v. California*, No. 12, Original, Oct. Term, 1946, p. 143.

<sup>32</sup> 27 Tex. Law Rev. 140, 150 (1948).

The Solicitor General now contends, not as a matter of law, but as an indication of intention of the parties to the Agreement, that

“ . . . since the original states have never owned the marginal belt, Texas cannot do so and remain on an ‘equal footing.’ . . . ”<sup>33</sup>

The Solicitor General says that “The ‘equal footing’ clause . . . is the classic expression of the constitutional equality of all states.”<sup>34</sup> This is so. But it is obvious that all states cannot be made physically equal. However this Court rules, the inland states will have no seacoast, nor will Texas have New York Harbor or the bed of Lake Michigan.

The rule of equality refers to political rights, not property rights. As said in *Stearns v. Minnesota*, 179 U.S. 223, 244-245 (1900):

“It has often been said that a state admitted into the Union enters therein in full equality with all the others and such equality may forbid any agreement or compact limiting or qualifying political rights or obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a state to deal with the nation or with any other state in reference to such property. The case before us is one involving simply an agreement as to property between a state and the nation.

“That a state and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions

<sup>33</sup> Brief for the United States, p. 66.

<sup>34</sup> Brief for the United States, p. 61.

of this Court, and that they have been frequently made, in the admission of new states, as well as subsequently thereto, is a matter of history. . . .”

It is indeed a matter of history that the original colonies were not equal in property;<sup>35</sup> that the original states were not “equal”;<sup>36</sup> that the cessions by such states were not equal, but subject to many different reservations and exceptions;<sup>37</sup> and that the states subsequently admitted were not “equal” as to property.<sup>38</sup>

The original states were sovereigns of the soil within their boundaries. The states created out of ceded territory were not. As this Court said of the new state of Illinois, “She surely cannot claim a right

<sup>35</sup> See *Johnson and Graham's Lessee v. McIntosh*, 8 Wheat. 543, 579 (1823).

<sup>36</sup> See Story, *Commentaries on the Constitution* (5th ed. 1891) 166.

<sup>37</sup> Donaldson, *The Public Domain*, 82-86.

<sup>38</sup> Vermont, March 4, 1791, was a sovereign of the soil by purchase from New York. Donaldson, *The Public Domain*, pp. 42-420. Kentucky, June 1, 1792, was largely under Virginia law. *Green v. Biddle*, 8 Wheat. 1 (1823). Tennessee, June 1, 1796, was largely reserved by North Carolina. *Id.* at 77, 78, 83. Ohio, November 29, 1802, was subject to reservations by Virginia, *id.* at 68, 69, and the remainder was disposed of by the United States. The public domain in the other states admitted prior to Texas was disposed of by the United States, except for Maine, which was sovereign of her soil. *Id.* at 38. These states were Louisiana (1812), Indiana (1816), Mississippi (1817), Illinois (1818), Alabama (1819), Maine (1820), Missouri (1821), Arkansas (1836), Michigan (1837), and Florida (1845). All were “admitted into the Union on an equal footing with the original States in all respects whatever.” Collected in Thorpe, *The Federal and State Constitutions* (1909).



to the public lands within her limits.”<sup>39</sup> New states were admitted so as to “participate in political power . . .” and “. . . share in the government.”<sup>40</sup> The power of Congress in admission acts to make conditions and terms as to rights of property was conceded, while the power to control political rights was denied.<sup>41</sup>

Indeed, in the case cited by plaintiff, *Coyle v. Smith*, 221 U.S. 559 (1910), the Court distinguished *Beecher v. Wetherby*, 95 U.S. 517 (1877), and *Minnesota v. Bachelder*, 1 Wall. 109 (1864), on the ground that both involved the power of Congress to regulate the disposition of public lands, saying that

“Minnesota v. Bachelder . . . is another case which involved nothing more than an exertion by Congress of its power to regulate the disposition of public lands.” (578.)

The “equal footing” clause, as used in the various enabling acts, has never been held to convey any

<sup>39</sup> *United States v. Gratiot*, 14 Pet. 526, 538 (1840).

<sup>40</sup> *American Insurance Company v. Canter*, 1 Pet. 511, 542 (1828).

<sup>41</sup> *Permoli v. First Municipality*, 3 How. 589 (1844); *Cooper v. Roberts*, 18 How. 173 (1855); *The Kansas Indians*, 5 Wall. 737 (1866); *Withers v. Buckley*, 20 How. 84 (1857); *Gibson v. Chouteau*, 13 Wall. 92 (1871); *United States v. 42 Gallons of Whiskey*, 93 U.S. 188 (1876); *United States v. McBratney*, 104 U.S. 621 (1881); *Escanaba Co. v. Chicago*, 107 U.S. 678 (1882); *Cardwell v. American Bridge Co.*, 113 U.S. 205 (1884); *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S. 525 (1885); *Huse v. Glover*, 119 U.S. 543 (1886); *Williamette Iron Bridge Co. v. Hatch*, 126 U.S. 1 (1888); *Ward v. Race Horse*, 163 U.S. 504 (1895); *Dick v. United States*, 208 U.S. 340 (1908); *Alabama v. Schmidt*, 232 U.S. 168 (1914); *McCabe v. A. T. & S. F. Ry.*, 235 U.S. 151 (1914); *Hawkins v. Bleakly*, 243 U.S. 210 (1916).

property or control of lands to the United States. Instead, it is plain that the clause is intended for the benefit of new states, and, on well-settled principles of construction, if such clause is effective for any purpose, it is to create rights in such states, not to transfer property to the United States. This is true even as to the property of a territory. As said in *Brown v. Grant*, 116 U.S. 207, 212 (1886):

“Unless otherwise declared by Congress, the title to every species of property owned by a Territory passes to the State upon its admission into the Union.”

In *Case v. Loftus*, 39 Fed. 730 (C.C. Ore., 1889), the Court said:

“The doctrine that new states must be admitted into the Union on an ‘equal footing’ with the old ones does not rest on any express provision of the constitution, which simply declares (Article 4, Sec. 3) ‘new states may be admitted by congress into this Union,’ but on what is considered to be and has been held by the Supreme Court to be the general character and purpose of the union of the states, as established by the constitution,—a union of political equals. . . .

“But certainly this equality does not require that the new state shall be admitted to any right in the soil thereof considered as property. The ante-Revolution states acquired no property in the soil thereof by entering into the Union. The lands that had not passed into private hands they already owned and held as the political successors of the British crown.

“The true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same

measure of local or self government, and to be admitted to an equal participation in the maintenance, administration and conduct of the common or national government."

The plaintiff's contention is an inversion of the doctrine of *Pollard's Lessee v. Hagan*, 3 How. 212 (1844), which plaintiff says is an "unsound doctrine."<sup>45</sup> It is not clear whether plaintiff is asserting the rule of the *Pollard* case or is attacking such rule, as in the *California* case. In either event, the *Pollard* rule has no application to Texas, which has owned since independence the beds of all navigable waters within its boundaries.<sup>46</sup> Texas' right to define its waters as navigable has never been disputed by the United States. The United States has not asserted, and does not here assert, any title under the "equal footing" doctrine to the non-navigable streams and lakes in Texas.<sup>47</sup> The cases relied on by plaintiff in its brief (p. 63) have no application to any of the waters within the boundaries of Texas, Texas never having been a territory.

Nor does the "equal footing" doctrine apply to state boundaries. Louisiana, Mississippi, and Alabama, fronting the Gulf of Mexico, were admitted "on an equal footing." Louisiana's boundary included "all islands within three leagues of the coast."<sup>48</sup>

<sup>45</sup> Brief for United States, p. 42, note 21.

<sup>46</sup> *Heard v. Town of Refugio*, 129 Tex. 349, 103 S. W. (2d) 728 (1937).

<sup>47</sup> Compare *United States v. Oregon*, 295 U.S. 1 (1935) with *State v. Bryan*, 210 S. W. 2d 455 (Tex. Civ. App., (1948), writ ref., n.r.e.).

<sup>48</sup> *Thorpe, op. cit.*, Vol. 3, 1376.

The Mississippi and Alabama boundaries included "all islands within six leagues of the shore."<sup>49</sup>

The inapplicability of plaintiff's argument to the water boundaries of Texas is shown by the case of *Oklahoma v. Texas*,<sup>50</sup> to which the United States was a party. There the Court held that the south half of the bed of the Red River belonged to the United States, not Texas, because the area north of the south bank

"... constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that state into the Union, and was not within the limits nor under the jurisdiction of that state. . . ."<sup>51</sup>

Actually, plaintiff's suggestion that the "equal footing" and "sovereignty" clauses be used as an aid to interpret what property the parties intended for Texas to retain, is fatal to its case. The State has an abundance of evidence from Congressional Records which show conclusively that in 1845 the members of both the United States and Texas Congresses *then believed* that new States would own all lands beneath navigable waters within their boundaries, inland and coastal, even without express grant or

<sup>49</sup> Thorpe, *op. cit.*, Vol. 1, 89-92.

<sup>50</sup> 258 U.S. 574, cited p. 63 of Brief for the United States. The Court followed 256 U.S. 70 and *United States v. Texas*, 162 U.S. 1.

<sup>51</sup> 256 U.S. 70, 83; 258 U.S. at 579. See also *United States v. Texas*, 162 U.S. 1 (1896); *Oklahoma v. Texas*, 272 U.S. 2, 25, 49 (1926); and *New Mexico v. Texas*, 275 U.S. 279 (1927); all of which adjudicated Texas' boundaries in accordance with their existence at the time of annexation rather than on "equal footing" principles.



retention, under the then existing concept of State sovereignty and the "equal footing" doctrine.<sup>52</sup> It is elemental that the 1845 belief of the parties as to the meaning of the clauses as applied to submerged land is the understanding which should be applied now in interpreting what they intended. It should be remembered that several State court decisions and two Supreme Court decisions had previously stated Congress' 1845 belief as the law. As early as 1842 in *Martin v. Waddell* (16 Pet. 367, 410), it was said:

"... when the revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

The rule had been announced again by the Supreme Court in 1844 in the case of *Pollard v. Hagan* (3 How. 212, 229), as follows:

"First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the Original States."

<sup>52</sup> A majority of the members of Congress in 1946 and 1948 expressed the same understanding. See the wording of H. J. Res. 225, 79th Cong., 2d Sess. (1946); 92 Cong. Rec. 9642, 10316 (1946) confirming titles to the States, which was vetoed by the President. 92 Cong. Rec. 10660 (1946). Also see S. 1545, 81st Cong., authored by 31 Senators for the same purpose and containing the same interpretation; and H. R. 5992, 80th Cong., which passed the House by a vote of 257 to 29. 94 Cong. Rec. 5155 (1948).

The understanding and belief as to the law on this subject in 1845 is forcibly shown by the following language of this Court in the *California* case (332 U. S. at 36).

“As previously stated this Court has followed and reasserted the *basic doctrine of the Pollard case* many times. And in doing so it has used language strong enough to indicate that the Court *then believed that States* not only owned tidelands and soil under navigable inland waters, but also *owned soils under all navigable waters within their territorial jurisdiction, whether inland or not.*”

Obviously, the effect of the use of the term “equal footing” and all terms relating to defense, sovereignty, and retention of lands by the State, should be determined in the light of what the parties believed the law to be at the time. When that is done, it will be clear that the parties intended the retention of lands by the State to be as broad as it was written on the face of the document—covering all lands<sup>53</sup> “lying within its limits.”

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<sup>53</sup> Blackstone, in describing what is meant by “lands,” said: “For *land*, says Sir Edward Coke, comprehendeth, in its legal signification, any ground, sod, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. . . . It is observable that water is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of water only . . . but I must bring my action for the land that lies at the bottom. . . . So that the word ‘land’ includes not only the face of the earth, but everything under it, or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods,

It would take every acre of the lands and minerals here involved within Texas' three-league boundary to offset the inequity which would result from a different interpretation of the agreement at this late date. For instance, to the States which did not retain their lands, Congress has made large land grants within their boundaries for public education. The list includes:<sup>54</sup>

Arizona	8,093,156	acres
California	5,534,293	"
Colorado	3,685,618	"
Montana	5,198,258	"
New Mexico	8,711,324	"
Oregon	3,399,360	"
Utah	5,844,196	"
Wyoming	3,470,009	"
Texas	NONE	

As shown above, plaintiff is asking this Court to place an interpretation on the Agreement which is at variance with the intent of the Congress of 1845 and the interpretation of subsequent Congresses. The total acreage within the three-league belt here involved is 2,608,774 acres, an amount less than any

his waters, and his houses, as well as his fields and meadows. . . . the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term, made use of; but by the name of the land, which is *nomen generalissimum*; everything terrestrial will pass."

2 Bl. Comm. 17-19. Blackstone's definition of land was still accepted in the edition of Kent's *Commentaries on American Law* annotated by Oliver Wendell Holmes, Jr., in 1884. 3 Kent's Comm. 401.

<sup>54</sup> *Statistical Abstract of the United States* (1948 ed.), Table No. 188.

of the above listed States received for school purposes. The Texas mineral estate in these lands is vested wholly in its Permanent School Fund. Shall it be decreed to the United States under a new interpretation so that the State can be put on "equal footing" by receiving a return grant of the same property for school purposes, or shall it be left with the public school fund under the same interpretation that has made it unnecessary and impossible for Congress to grant Texas lands within its borders as it has within the borders of other States?

The answer will be simple when the Court has heard all the evidence which can be produced showing that the parties never understood any provision of the Agreement to restrict Texas's retention of lands by eliminating the type of submerged lands which they *then believed* to belong to all the States.

#### THE "BOUNDARY ADJUSTMENT" CLAUSE

Plaintiff seeks to obtain some benefit to its interpretation of the Annexation Agreement from the clause providing for "the adjustment" by the United States of boundary questions "that may arise with other governments." As shown by the boundary discussion, the only "other government" with which there was any dispute as to the extent of the boundaries of the Republic of Texas was Mexico, and President Polk had specifically agreed to maintain the boundary claimed by Texas even if it meant war with Mexico.<sup>55</sup> That the purpose of this provision related only to the boundary between Texas and

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<sup>55</sup> *Supra.* p. 83.



Mexico is shown by the debates in Congress on the compromise of 1850. Mr. Butler, of South Carolina, said that Texas

“delegated to the Federal Government no more power than to settle that boundary [the Rio Grande] between her and Mexico.”<sup>56</sup>

Mr. McLean, of Kentucky, said:

“This question of boundary was a dispute between Texas and Mexico. The United States became the agent of Texas, with full authority to settle this dispute. . . .”<sup>57</sup>

Mr. Volney E. Howard, a member of the House from Texas, stated that

“Texas was admitted into the Union with specified boundaries, subject only to the right of the United States to settle all questions of boundary which may arise with other governments. This was a naked power, coupled with no interest, which must be strictly construed. Under it the Texas boundary, with any foreign government, might have been settled. But, as the late treaty with Mexico removed the possibility of such a question with any other government, the power is at an end. Neither could the United States, thus acting as the trustee of Texas to settle the boundary with other governments, acquire of any government a right in opposition to the claim of Texas. To assert such a proposition is to affirm that the trustee may acquire the subject matter of the trust in oppo-

<sup>56</sup> Appendix to Cong. Globe, 31st Cong., 1st Sess. 1574.

<sup>57</sup> *Id.* at 713-714.

sition to the beneficiary, or that the judge or arbitrator may adjudge the subject of controversy to himself in opposition to the parties litigant. It is evident that whatever right the United States acquired under the treaty with Mexico to the country east of the Rio Grande was acquired as the trustee of Texas and inures to the benefit of that State."<sup>58</sup>

Governor Wood, of Texas, wrote the following letter to President Polk on October 6, 1848:

"By the resolutions of annexation it is provided that 'the territory properly included within and rightfully belonging to the Republic of Texas, might be erected into a new State, to be called the State of Texas.' . . .

"The object and purpose of this reservation in the resolutions, cannot be misconceived. It was asked on the one hand and yielded on the other, in order that the Government of the United States might not have to approach the settlement of her actual or prospective difficulties with Mexico, clothed with only a qualified and imperfect power of adjustment. In a spirit of confidence which she hopes never to have occasion to regret, Texas constituted the Federal Government her agent and trustee in the adjustment of her boundary. And had that Government, induced by any of those high considerations of justice or national policy, in exercising that trust, deemed it proper to yield a portion of the territory claimed by Texas, remote from her settlements, and making fair compensation therefor, as she would have been bound to do, not an expression of dissatisfaction would have been heard from her. This was a liberal and

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<sup>58</sup> Cong. Globe, 31st Cong., 1st Sess. 207.

humane offering which she was prepared to make on the altar of peace. Construe this condition in any other wise, and suppose the power of adjusting our boundary to be a general one, Texas occupies a strange and anomalous position in the Union, unlike that of every other State. Instead of being a co-equal with them, she is made a mere appendage; dependent for her very existence upon the capricious favors of power.

"Standing then in the relation of an agent or trustee towards Texas, the General Government in any treaty or negotiations in regard to boundary, could not acquire a right to territory within limits even claimed by her, much less where that claim had been acknowledged on their part. To permit this to be done, would be a subversion of the settled principles of law and equity in such case. For it would be to allow the agent to contract against the rights of his principal, the trustee against those of his *cestui que trust*, the guardian against those of his ward, and to divert their acquisitions in these capacities to their own use."<sup>59</sup>

Certainly this authority given to the United States was not intended to permit the United States to "adjust" the boundaries of Texas for its own benefit, as the United States seeks to do in this case. This was indicated in a speech by Mr. Harris, of Alabama, on June 10, 1850, who, in discussing the compromise question, said:

"... According to every principle of justice and law, the country acquired from Mexico, inured to the benefit of Texas, up to the last

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<sup>59</sup> House Journal (1849) 226-228.

inch of her asserted boundary. The United States cannot claim now, that any portion of it is beyond the limits of the State of Texas, and assert a right of property in themselves. To do so, would not be more unconscionable than if an umpire selected to adjust a matter of controversy, should purchase the claim, however exorbitant, of one of the parties, and then decide in favor of himself. So, sir, whatever doubt may have reasonably existed upon this question of boundary prior to the annexation of Texas, the whole world is now estopped from making it a subject of inquiry.

“ . . . And any portion of the territory claimed by Texas, which this Government may seek to appropriate to itself, will be taken in its character of an undisguised and shameless plunderer.”<sup>60</sup>

In its brief the United States “cautions that the balance should weigh against including areas of potential international controversy under the ‘vacant and unappropriated lands’ clause, unless the strongest reasons exist for doing so.”<sup>61</sup> It is significant, however, that the United States does not contend that the Rio Grande, admittedly owned by Texas, should not be included within that clause, since that boundary is the only one over which there has been any international controversy. The same argument plaintiff makes here is just as applicable to the Great Lakes; yet, the United States has adjusted with Canada the boundaries of Michigan, Ohio, Pennsylvania, and New York in the center of the

<sup>60</sup> Appendix to Cong. Globe, 31st Cong., 1st Sess. 781.

<sup>61</sup> Brief for the United States, p. 40.



Lakes without deeming the act an implication of ownership of the subsoil which this Court has held to belong to the States having it within their "adjusted" boundaries.<sup>62</sup>

In its brief the United States says that "in 1845, as today, the marginal sea was the potential subject of a grave international dispute which might be settled by various international undertakings and commitments bearing directly on rights in, and the control and use of, that area."<sup>63</sup> This argument is rendered wholly inapplicable when it is understood that the Rio Grande River line was the real dispute. It was settled by war and several treaties but the bed and subsoil are admitted to belong to the State, and we can and will offer opinions by the Attorney General of the United States holding that the bed was retained by reason of the retention by Texas in the Annexation Agreement of the "vacant and unappropriated lands lying within its limits."

#### THE "PROPER TERRITORY" CLAUSE

As shown in the boundary discussion, *supra*, p. 63, the three-league boundary of the Republic of Texas was recognized by the United States and other major nations of the world. The marginal sea, having been properly included within, and having rightfully belonged to, the Republic, was a part of the new State of Texas.

#### THE NATIONAL SOVEREIGNTY CLAUSE

Defendant recognizes that the Federal Government is possessed of paramount governmental

<sup>62</sup> See national sovereignty discussion, this page.

<sup>63</sup> Brief for the United States, p. 40.

powers over the marginal sea belt here in controversy. These powers are attributes of national sovereignty. That ownership of lands and minerals in the marginal sea is not a necessary attribute of national sovereignty, <sup>64</sup> however, is recognized by the *California* decision. There, Mr. Justice Black indicated that "a congressional surrender of title" to the resources of the soil under the marginal sea could be made to the coastal states.<sup>65</sup>

In 1946, Congress passed a joint resolution quitclaiming to the coastal states submerged lands in their marginal belts, but this resolution was vetoed by the President. Such a quitclaim would not in any way affect the paramount governmental powers of the Federal Government, since these powers exist over all property at all times. As said in the *California* opinion with reference to the State's police powers in the area, these cannot and do not "detract from the Federal Government's paramount rights in and power over this area."<sup>66</sup>

The plaintiff does not argue that transfer of national sovereignty included ownership of the lands and minerals in controversy as a matter of law. In fact, in its brief in the *California* case, at p. 89, plaintiff said:

"We do not argue that the effective exercise of the foregoing powers (national defense, commerce, international relations) granted to the

<sup>64</sup> As to minerals, see *Moore v. Smaw* and *Freemont v. Flower*, 17 Cal. 199 (1861), opinion by Field, later a member of this Court, *supra*, p. 124.

<sup>65</sup> 332 U.S. 19, at 39. See also quotations at 27 and 40 copied in footnote 11, pp. 8-9, *supra*.

<sup>66</sup> 332 U.S. 19, at 36.

Federal Government by the Constitution would be impossible without ownership of the marginal sea."

The argument urged in this case concerning the transfer of national sovereignty is that it indicates the parties intended the clause retaining lands "lying within its boundaries" to be exclusive of the marginal belt within those boundaries. The point has been fully answered hereinabove in connection with the other clauses of the Annexation Agreement which refer wholly to governmental powers. It can be shown from the records to be introduced in evidence that many representatives of the contracting parties understood that the new State would own the lands in controversy, and, from our research, it is doubtful if plaintiff can show that a single member of Congress or any of the negotiators believed that national sovereignty required or implied national ownership of this property. Why should it, when the ownership itself is subject to, and must never interfere with the exercise of, the paramount governmental powers of the national sovereignty over the area?

That State ownership of the subsoil of the marginal sea does not in any way conflict with the exercise of these powers by the Government was indicated in an opinion of the Attorney General of the United States dealing with the treaty power of the United States over fisheries in the Great Lakes. The *Genesee Chief* case, 12 How. 443 (1851), had already compared the Great Lakes to the open ocean. There the Court said:

"A great and growing commerce is carried on upon them between different States and a for-

aign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other." 12 How. at 453-454.

The Attorney General's opinion was written shortly after the decisions of *Illinois Central Ry. v. Illinois*, 146 U.S. 387 (1892), and *United States v. Rodgers*, 150 U.S. 249 (1893). In the *Illinois Central* case, it was held that "the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits."<sup>67</sup> Soon after this de-

<sup>67</sup> In holding that the States own the beds of the Great Lakes, this Court said:

"The same doctrine is in this country held to be applicable to lands covered by the fresh water in the Great Lakes over which is conducted and extended commerce with different States and foreign nations. These Lakes possess all the general characteristics of open seas, except in the freshness of their waters and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tidewaters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these Lakes. 146 U. S. at 435.

"We hold, therefore, that the same doctrine as the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tidewaters on the borders of the sea." 146 U.S. at 436-437.



cision, the *Rodgers* case compared the waters to the Black Sea and held them to be "high seas" subject to the admiralty jurisdiction of the United States.<sup>68</sup>

The opinion of the Attorney General<sup>69</sup> held that the President and the Senate had the power to conclude a treaty for the protection of fisheries in the Great Lakes, even though it deprived the states of jurisdiction and authority then vested in them. As authority for this conclusion, the Attorney General quoted from *Geofroy v. Riggs*, 133 U.S. 258 (1889), where the Court said:

"The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its departments, or those arising from the nature of the Government itself and that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. But with these exceptions it is not perceived that there is any limit to it touching any matter which is properly the subject of negotiations with a foreign country."

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<sup>68</sup> It should be pointed out that the eight Great Lakes States have a total of 60,306 square miles of submerged lands beneath the Lakes which have been held to belong to them. This is more than twice the amount of acreage claimed by the twenty-one coastal States within their combined marginal belt. Michigan alone, with 24,613,760 acres under the waters of the Lakes, has more acreage than the coastal state belts combined. See Senate Judiciary Committee Report, Senate Report 1592, 80th Cong., pp. 129-130, re S. 1988.

<sup>69</sup> 22 Ops. Att'y. Gen. 214.

Thus, State ownership of the subsoil of these lakes, which are held to be "high seas," did not conflict with the Federal Government's powers of concluding treaties and conducting relations with foreign countries.

Likewise, the ownership by Texas of the subsoil of the Gulf of Mexico within its boundaries has never conflicted with the defense and foreign affairs powers of the Federal Government. These powers have been exercised by the United States in this area for more than one hundred years. We can show by evidence that there has been no instance of conflict with, or interference by, the State of Texas in the exercise of these powers. The complete absence of any conflict with the national defense and commerce powers of the Federal Government is shown by the fact that any occupancy and use of these lands and waters must receive the prior approval of the Corps of Engineers of the United States Department of Defense. This is shown also by the fact that during the two World Wars the Federal Government readily obtained all of the oil needed from this area for supplying the nation's armed forces, at the price fixed by the Government.

(6) *Subsequent construction confirms this interpretation of the Agreement.*

The intention of the parties that submerged lands and minerals were to be retained by the State of Texas is shown in bold relief by the subsequent construction of the Annexation Agreement by both the United States and Texas. As previously shown, the

United States in the Treaty of Guadalupe Hidalgo in 1848, in the Gadsden Treaty in 1853, and in the surveying of the international boundary between the United States and Mexico in 1911 expressly recognized the three-league boundary of the State of Texas in the Gulf.

The evidence will show that inventories were made, by both Federal and State officials, of the property which was to be ceded by the State to the United States, deeds of cession delivered on the real property, and formal acceptance made of both real and personal property by United States officials. The United States accepted this property and made no claim to any other.

For over one hundred years after annexation, the State of Texas has exercised complete control over the lands, minerals, and waters of the Gulf of Mexico within three leagues of its coast, subject, of course, to the paramount powers of the United States over foreign affairs, national defense, navigation, and commerce.

The State has passed legislation to control fishing in these waters, cultivation of oyster beds, the extraction of oil, sand, and gravel from these submerged lands, the building of docks and piers over these waters and lands, and the granting of all property rights for public improvements as far as three and one-half miles from shore. Regardless of other explanations which might be used to justify their enactment, these statutes and many others actually have been enacted on the basis that Texas owned the lands to which the regulations applied.

The State has exercised its jurisdiction and control over this area without conflict with the paramount powers of the Federal Government over commerce, navigation, national defense, and foreign affairs. For example, as early as 1856 the legislature passed an act granting the State's consent to the United States to construct breakwaters, jetties, dams, and other works for the improvement of harbors, bays, and arms of the sea, and to take from the public domain of the State and private individuals, on paying just compensation, the materials necessary for the construction of such works.<sup>70</sup>

The evidence will show that all acts of possession, control, and use that could be exercised by private ownership have been exercised by the State of Texas. All this was done with the knowledge of, and without protest from, the United States. Instead, the United States has in many instances recognized the right and title of the State to these lands and minerals. An example of such recognition is that the United States has requested, and the State has executed, patents and deeds of cession to certain submerged lands in the Gulf of Mexico.<sup>71</sup>

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<sup>70</sup> Acts, 6th Leg. 1855, 11; 4 Gammel's Laws of Texas 191.

<sup>71</sup> Two examples are as follows:

On June 28, 1912, the State of Texas, at the request of the United States, patented to the United States 658 acres of land on Galveston Island and also submerged lands on which Galveston Jetty was constructed, extending over three miles beyond low-water mark in the Gulf of Mexico. (General Land Office, State of Texas, Patent No. 47, Vol. 39, File 103.)

On December 6, 1880, the State of Texas granted to the United States a tract of "Sub Marine land" 10,480 feet from Boliver Point Lighthouse Tower and 17,280 feet W 27° N from North Breaker Beacon of Galveston harbor, the land being covered by four or five feet of water. (Patent No. 633, Vol. 32, p. 633.)



Another example of recognition by the United States of the ownership by Texas of all lands within the original boundaries of the Republic is an opinion written by the Attorney General of the United States on August 4, 1908.<sup>72</sup> The question involved was whether the title to the abandoned bed of the Rio Grande, around what is known as "Cordova cut-off" within the city limits of El Paso, was in the United States, the State of Texas, or the riparian proprietors. The Attorney General in that opinion recognized that the title to the river bed was in the State of Texas, saying:

"I am therefore of opinion that all vacant and unappropriated lands within the limits of Texas which belonged to the Republic of Texas now belong to and are vested in the State of Texas and that the title to the same has never been in the United States, the United States owning in the State of Texas only such lands as have been acquired by purchase or condemnation under the laws of Texas and such land as was excepted by the Joint Resolution referred to above."

Another example is an opinion of the Department of the Interior in 1919.<sup>73</sup> In that opinion, the First Assistant Secretary held that the United States is without jurisdiction over the vacant and unappropriated lands within the State of Texas. The opinion also stated that the United States has no duty to perform in Texas as to surveys, determinations, or ad-

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<sup>72</sup> Opinion No. 18089-12-13, Records of Boundaries and Claims Commissions and Arbitrations: Mexican Boundary, Envelope 37, National Archives.

<sup>73</sup> 47 Decisions of the Department of the Interior in Cases Relating to the Public Lands (1921) 372.

justments necessary to define the rights of any parties in interest; they must be performed by the State or such other tribunals as may have authority therefor.

The First Assistant Secretary said:

"It is clear that the United States is bound by contract to permit Texas to retain her public lands, and by treaty and international law is compelled to recognize that private rights preserve the legal value which they possess. Thus, whether a claim to lands is public or private, the United States has nothing whatever to do with it as a proprietary interest in Texas. . . . It is clear that when the United States agreed that Texas should retain its vacant and unappropriated lands, it was recognized and admitted that the State of Texas should take the title of the Republic of Texas in and to such lands." (378-379.)

These are only a few examples of the evidence which Texas has collected throughout the past year bearing on the subsequent construction of the Annexation Agreement by both the United States and Texas. For over a year, full time researchers have been collecting this evidence from the State Archives, the files of various State departments, county records, the National Archives, the Library of Congress, and the files of various departments of the Federal Government. This evidence necessarily is voluminous and can properly be presented only by a record made before a Master.

This evidence will form a most convincing chain of continuous subsequent interpretation by the par-

ties to the contract. It is not sought to be offered on a contention that the President of the United States, the Attorney General, the Secretary of State, the Secretary of the Interior, the Secretary of War, or other officials could by their acts alone estop the United States from any claim it might now make. On the contrary, the evidence of their acts will be offered strictly as subsequent interpretations by responsible officials of the intention of the parties at the time they made the Annexation Agreement. That evidence of this type is probative in determining the intention of parties to a treaty was recognized in *Massachusetts v. New York*, 271 U.S. 65, 95-96 (1926).

The intention that Texas retain all lands and minerals within the boundaries of the Republic is shown also by the subsequent construction of the Annexation Agreement by both Federal and State courts.

In *Amaya v. Stanolind Oil & Gas Co.*, 62 F. Supp. 181, 188 (S.D. Tex. 1945), *aff'd* 158 F. 2d 554, *cert. den'd* 331 U.S. 808, referring to the Joint Resolution of Annexation, the court said:

"Another matter worthy of note with reference to this joint resolution was that the *only ceding* done by Texas to the United States was in the second paragraph, which reads, in part, as follows:

" . . . . After ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to said Republic of Texas. . . . "

*"The balance of such property rightfully belonging to the Republic of Texas was reserved by the new state."*

The State's "unquestioned . . . ownership of the waters and submerged lands of the Gulf of Mexico" was recognized in *City of Galveston v. Mann*, 135 Tex. 319, 143 S. W. 2d 1028, 1032-33 (1940), the court saying:

"In the Resolution of the Congress of the United States pertaining to the Annexation of the Republic of Texas as a State into the Federal Union, of date March 1, 1845, 5 Stat. 797, it was provided that the Republic retained for the State 'all the vacant and unappropriated lands lying within its limits,' subject only to the superior rights of navigation of the Federal government in the navigable waters of the State. . . .

"This Court in many important decisions has zealously guarded and enforced the rights of this State to the public lands of the State as provided and guaranteed to it in the foregoing resolutions of the Republic of Texas, the resolutions of the United States Congress appertaining to the annexation of the Republic of Texas, and in the Acts passed by the legislature of the State of Texas."

It was thus recognized by the court that "vacant and unappropriated lands" included the lands under all navigable waters within the boundaries of the Republic and State of Texas and that

"The State is the source of all title to land in this State, including the navigable waters of the



State . . . [and] anyone claiming title to any particular portion of the State's property must show that the same has been segregated by some formal grant or purchase, and that it no longer forms a part of the State's domain." 143 S. W. 2d at 1034.

*State v. Jadwin*, 85 S. W. 490, 491-92 (Tex. Civ. App. 1904, error ref.) involved the title to certain lands on the east end of Galveston Island. Defendants alleged that they were agents of the United States government and held possession under the title of the United States. The question before the court was: "Did the United States government get title to any land on the east end of Galveston Island by virtue of the annexation treaty with the Republic of Texas?" In upholding the title of the State to the land, the court said:

"Whether, then, the federal government thereby acquired any land on the east end of Galveston Island, depends on whether at the date of admission into the Union the republic of Texas had devoted any land at that point to defensive purposes. Neither by the articles of annexation nor otherwise were any lands on the island conveyed to the United States by any more definite description than that above given.

". . . The state showed that the land sued for was within its borders. It then, of course, developed upon defendant to show that it had in some way parted with its title. . . . It may be also mentioned in this connection that the United States has, since the admission of Texas into the Union, purchased a tract of land on the east end

of the island, and one in the shallow waters adjacent, and in neither instance was any assertion of title made to the lands in question. . . . The land upon the island belonged to the state. Equally the waters of the bay and the gulf for three leagues from the shore. As between Texas, as the grantor, and the United States, as grantee, the grant could not be enlarged by accretion. What Texas granted to the federal government was the specific lands devoted to purposes of public defense. . . .”

An appeal was taken to this Court, but the appeal was dismissed by the Solicitor General of the United States. The records of the Solicitor General show that the reason for the voluntary dismissal was that there appeared “no ground upon which this case can now be reversed.” The United States recognized throughout the case that its only claim to the land, every portion of which during the controversy had been under water either of the bay or the Gulf, depended upon whether the land was a part of a defense installation or military reserve of the Republic of Texas at the time of annexation.

**c. The Long-Continued Possession of These Lands and Minerals by the Republic and State of Texas, Acquiesced in and Approved by the United States, Precludes an Assertion by the United States of Rights Inconsistent Therewith.**

In addition to its other defenses, defendant has pleaded as a special defense to plaintiff's action herein that the State of Texas, under the doctrine of prescription, has established such title, ownership, and

sovereign rights in the area as preclude the granting of the relief prayed for by the Federal Government.

The questions of fact and of law raised by this affirmative defense were ~~passed~~<sup>not</sup> upon by the Court in *United States v. California*, 332 U.S. 19. There the Government argued, and the Court apparently held, that the United States acquired full rights in the submerged lands off California's coast from the Republic of Mexico prior to the admission of California as a State, that these rights were not ceded by the Federal Government to the State of California at the time of its admission into the Union, and that California had not purported to occupy the land adversely to the United States until comparatively recent times. Thus the Court said:

"As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the state nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt." 332 U.S. at 39.

This statement was made by the Court upon the basis of a record to which the State had agreed and "neither [party had] suggested any necessity for the introduction of evidence" as to the nature of the State's adverse claim. 332 U.S. at 24.

No such situation is presented here where the case arises upon motion for judgment on the pleadings and the plaintiff apparently urges that as a matter of law prescription is not available to the defendant.

The basic facts alleged by the State of Texas in support of this affirmative defense are that as to the

lands and minerals in controversy, the United States has never been in possession of them nor has the Congress or any federal official, except by this suit, asserted a claim to them adverse to that of the State of Texas. Any rights which the United States could have acquired in the area arose subsequent to the claim and possession of the Republic of Texas. During more than one hundred years, the Republic of Texas and then the State is alleged to have had open, adverse, exclusive, and uninterrupted possession of the land and minerals in controversy under claim of ownership, subject only (after annexation) to the constitutional paramount powers of the Federal Government. The State can by evidence show actual use and possession of the bed, subsoil, and minerals continuously from 1836 to the present time. It began this claim as an independent nation and has asserted it against not only the United States but against the world. In an international court prescription would prevent foreign nations from prevailing against Texas, and Texas' prescriptive title should not be destroyed now since Texas is one of the United States. What Texas owns against the outside world inures to the benefit of the nation. There is no wealth held by a single State of the Union which is not also a part of the total wealth of the nation and entitled to the respect and protection of the nation.

In such a situation the doctrine of prescription is clearly available to the State. In the early case of *Phillips v. Payne*, 92 U. S. 130, 132 (1875), this Court said:

"The law of prescription applies to nations with the same effect as between individuals."



See also *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1939). This doctrine of prescription has been expressly held by this Court to apply between Texas and the United States at a time when the United States held New Mexico as a territorial possession. *New Mexico v. Texas*, 275 U.S. 279, 298-299 (1927). The Court said:

“ . . . that, for at least thirty years prior to the admission of the territory of New Mexico as a State, the United States made no challenge of the claims to the land asserted by Texas and its citizens and, impliedly at least, recognized the practical line that had been established as the boundary between the Territory and Texas.”

On the other hand, all of the cases which plaintiff cites in support of a contrary proposition involve controversies between private individuals and the United States.<sup>75</sup> In all of these cases the United States was the original owner of the proprietary rights involved. In none of plaintiff's cases was the issue raised under circumstances in which the United States was a subsequent claimant to a State which began its prescriptive rights as an independent nation. It is, therefore, respectfully submitted that under the facts contained in defendant's first affirmative defense, plaintiff has shown no authority warranting its proposition that the doctrine of prescription is not available as a matter of law to the State of Texas.

Moreover, since the present case arises on the pleadings, it is well established that a plea of adverse possession raises such an issue of fact as to the na-

<sup>75</sup> Brief in Support of Motion for Judgment, p: 65.

ture of the claim asserted and the circumstances of its manifestation as will render improper the granting of a motion for judgment on the pleadings.<sup>76</sup>

- d. **The United States Is Estopped by the Acts of the Congress Alone or of the Congress and of the President to Deny the Rights of Texas to the Lands and Minerals in Controversy.**

Since they depend ultimately upon the same basic principle, the second and third affirmative defenses will be treated together. It should, however, be borne in mind that they rest on distinct acts or combinations of acts on the part of the United States which defendant alleges are sufficient to preclude the Federal Government from asserting the rights here sought to be asserted.

The first affirmative defense alleges that the Republic of Texas having been an independent nation recognized as such by the nations of the world, having validly fixed its boundaries three leagues from shore, having brought the area therein under its domestic law, and not having ceded to the United States by the Annexation Agreement the ownership or the same kind of paramount rights said in the *California* case to belong to the Federal Government, the United States is estopped and precluded by its acts in accepting the cessions of specifically named public property and sovereignty contained in the Annexation Agreement from now asserting rights con-

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<sup>76</sup> *Barnes v. South Pacific Co.*, 300 F. 481 (9th Cir. 1924); cf. *Cook v. Burnley*, 11 Wall. 659, 669 (1867); *Hill v. McCord*, 195 U.S. 395, 400 (1904); *United States v. Chaves*, 159 U.S. 452, 456 (1895); *McMickin v. United States*, 97 U.S. 204 (1877).

trary to that Agreement. The second affirmative defense alleges that the foregoing acts, considered with subsequent acts of the Congress and of the President and the Senate of the United States recognizing and confirming the original Agreement, constitute an estoppel precluding the United States from asserting, as against the State of Texas, the rights which it seeks in this case.

The basis of the estoppel thus alleged, the possibility of which the plaintiff does not undertake to dispute in its brief, is entirely distinct from the type of estoppel raised by the State of California in *United States v. California* and concluded against that State by decision of this Court. The estoppel involved in the latter case is an estoppel based upon the acts of certain officers and agents of the United States. As to such acts this Court quite properly said:

“Officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.” 332 U.S. at 40.

On the other hand, the acts upon which the State of Texas relies as creating an estoppel against the United States are not the acts of officers or agents of the United States who lack authority to dispose of Government property, but are instead the acts of the very branches of the Federal Government whose constitutional power it is to dispose of any property

rights which the United States of America may have." *Jones v. United States*, 137 U.S. 202 (1890).

Estoppel, like prescription, resting on considerations of fairness and justice, has been applied between sovereign nations. See Lauterpacht, *Private Law Sources and Analogies of International Law* (London, 1927) 203-207, citing seven important international arbitration cases where estoppel was made the basis of the award. At the time Texas entered into the agreement of annexation with the United States, both were sovereign nations. Under the terms of that agreement the Republic relinquished to the United States its national sovereignty and ceded to the United States specifically described public property. The terms of that agreement likewise included certain guarantees, including the ~~reservation~~ <sup>reservation</sup> to the Republic in its capacity as a new State of "vacant and unappropriated lands lying within its limits." The United States accepted the benefits of this international contract—accepted it by acts of the branch of the Government which has the ultimate power within our constitutional system to agree on behalf of the United States what property should and what property should not come to the United States under the agreement. By accepting the cessions of public property and sovereignty made

<sup>estoppel by</sup>  
" As the Court said in the *California* case:

"For Article IV, Sec. 3, Clause 2 of the Constitution vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' We have said that the constitutional power of Congress in this respect is without limitation, *United States v. San Francisco*, 310 U.S. 16, 29-30." 332 U.S. at 27.



by the State of Texas in carrying out this agreement, the United States is precluded from seeking to enlarge the bargain more than one hundred years later when it appears that Congress might have driven a better bargain than the one which it actually made in 1845. Such considerations were in the mind of this Court when it said in *United States v. Texas*:

“But it is said that the United States has in many ways, and during a very long period, recognized the claim of Texas to the territory in dispute, and upon principles of justice and equity should not be heard at this late day to question the title of the State.

“... This question deserves the most careful examination; for, long acquiescence by the General Government in the claim of Texas would be entitled to great weight.” 162 U. S. 1, 60-61 (1896).

Defendant believes that when all the evidence is before the Court the considerations of justice and equity in favor of the State of Texas will be conclusive on this point.

The injustice of a contrary result will, on all the evidence, appear more clearly when consideration is made of the conduct of the President and the Senate in the exercise of the treaty-making power of the United States. These specific treaties which recognized and confirmed the southern segment of Texas' three-league boundary where it adjoins the Republic of Mexico (see *ante*, p. 84-90) constitute that class of acts on the part of the United States (as distinguished from the unauthorized acts of an officer of

the United States) upon which the State of Texas was entitled to, and did, rely as confirming its retained right of property in the seabed and subsoil minerals within its original three-league boundary. The United States having so acted and the State having relied upon those acts and having changed its position in consequence thereof, the United States is now estopped to assert a claim contrary in legal effect to those acts and representations by its duly empowered branches of Government.

• If the plaintiff disputes the basic facts with regard to the consummation of these acts on the part of the United States and the reliance of Texas thereon, defendant submits that its two pleas of estoppel against the United States raise issues of fact and of law which can only be adequately considered and disposed of after a full hearing of all the evidence relating to these fact issues.

- e. **As to That Part of the Continental Shelf Outside the Original Three-League Gulfward Boundary of Texas, the Federal Government Has No Cause of Action Against Texas on Which to Base Its Plea for Judgment or Injunction.**

### *Statement*

The previous argument concerning the part of the continental shelf within the original three-league Gulfward boundaries of the State of Texas does not directly apply throughout to the part of the shelf beyond those boundaries. Neither the United States nor Texas made any assertion of dominion over the shelf beyond the three-league boundary line until recent years.

In 1941 the Legislature of Texas passed an Act making its Gulfward boundary a line twenty-seven miles from low-water mark.<sup>75</sup> In 1945 (September 28) President Truman issued a Proclamation declaring that the jurisdiction of the United States extends over the natural resources of its continental shelf beyond territorial waters to the edge of the shelf.<sup>76</sup> Thereafter, May 23, 1947, the Legislature of Texas passed an Act extending its territory gulfward to the edge of the continental shelf.<sup>77</sup> Thus, the United States, internationally, and the State of Texas, domestically, have asserted jurisdiction over all the continental shelf lying beyond the original Gulfward boundary lines of the Republic of Texas and within its present extensions of those lines.

No question of present-day international law concerning these claims is involved in this case. Neither does plaintiff, for the purpose of this case, question the validity of Texas' boundary extensions. (Plaintiff's brief, p. 72.) For its intended purposes the Presidential Proclamation is valid.

However, the validity of the Proclamation and its effect in our domestic law do not settle the problem of the distribution between State and Federal governments of ultimate jurisdiction and ownership over those resources. That is a matter of our federal constitutional law and of legislation thereunder. The

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<sup>75</sup> Acts, 1941, 47th Leg., Ch. 286, p. 454.

<sup>76</sup> 3 C.F.R., 1945 Supp., Proc. 2667, 13 Dept. State Bull. 484, 485 (1945).

<sup>77</sup> Acts, 1947, 50th Leg., Ch. 253, p. 451.

President's Executive Order accompanying issuance of his Proclamation expressly so recognizes. The Order, in part, says:

"Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states relating to the ownership or control of the subsoil and seabed of the continental shelf within or outside of the three-mile limit."<sup>78</sup>

That it was not intended as an assertion of ownership or jurisdiction as against the States was again clearly stated in the White House press release issued contemporaneously and published with the Proclamation in the *Department of State Bulletin* as follows:

"The policy proclaimed by the President in regard to the jurisdiction over the continental shelf does not touch upon the question of Federal versus State control. It is concerned solely with establishing the jurisdiction of the United States from an international standpoint."<sup>79</sup>

Therefore, the issue under plaintiff's Point III and this counterpoint is not whether Texas has title to, or paramount rights in; and dominion over, the continental shelf lands outside the marginal sea, but rather whether the United States has, as against Texas, such title, rights, or dominion as would entitle

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<sup>78</sup> 3 C.F.R., 1945, Supp., E. O. 9633.

<sup>79</sup> 13 Dept. of State Bulletin, 484 (Plaintiff's brief, appendix, p. 97).



it to the injunctive relief here sought. It is axiomatic that a plaintiff in an action of this nature must recover upon the strength of his own title and rights, or not at all. *McGuire v. Blount*, 199 U.S. 142; 18 *Am. Jur.* 21, § 20. "It is not incumbent upon the defendant to show any title." *Barrows v. Kindred*, 4 Wall. 399, 403 (1866).

The issue must be decided upon the rights, if any, that the United States now has to the area in dispute, *as against the State of Texas*. We are not here concerned with any claim that the United States may have in the future should Congress enact a bill now pending which declares "that the natural resources of the subsoil and seabed of the continental shelf appertain to the United States and are subject to its jurisdiction, control and power of disposition," and adjusts between the littoral States and the United States their claims and equities.<sup>80</sup>

Nor are we here any more concerned with questions of international law or international relations than was the Court in *Skiriotes v. Florida*, 313 U.S. 69, 72, 73 (1941). This controversy, as between the United States and Texas, involves no international rights and duties; rather, it involves, in the language of the *Skiriotes* case, "domestic rights and duties," and must be decided on principles of domestic or municipal law.

The acts of Congress cited by plaintiff are wholly irrelevant because they do not purport to apply to the natural resources of the subsoil of the continental shelf outside the marginal sea.<sup>81</sup> The Presidential

<sup>80</sup> H. R. 5991, 81st Cong.

<sup>81</sup> Both the Attorney General and the Solicitor General of the Department of Interior have held that the present Min-

Proclamation, when properly construed as a formulation of international policy, for which it was intended, is likewise immaterial in an action challenging the right of Texas, at a time when Congress has not entered the field, to continue exercising governmental powers necessary to protect, develop, and conserve these natural resources. *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Toomer v. Witsell*, 334 U.S. 385 (1948). Plaintiff's brief on Point III completely ignores the allegation of "ownership" in so far as this portion of the land is concerned. The Point is worded as follows:

"The United States has, as against Texas, at least the same paramount rights in, and dominion over, the lands underlying the Gulf of Mexico outside the marginal sea, as it has with respect to the marginal sea."

Plaintiff devotes its argument to paramount governmental powers possessed by the United States over the area, all of which, by the terms of the Proclamation and other acts cited, are intended only as assertions of the United States for international purposes *vis-a-vis* other nations. They make no attempt whatever to determine as between the Federal and State governments the respective rights within the area.

### *Domestic Law*

The only domestic legislation applying to this area of the shelf is that enacted by the State of Texas.

eral Leasing Act does not apply to these lands. Opinion M-34985, August 8, 1947, from the Solicitor of the Department of the Interior to the Secretary of the Interior; letter opinion from Attorney General Tom C. Clark to the Secretary of the Interior, August 29, 1947.

When Texas, on May 16, 1941, extended its Gulfward boundary to a line twenty-seven marine miles from its coast,<sup>82</sup> the President had not even asserted jurisdiction over the shelf for international purposes. The traditional policy of the United States with reference to that area had been expressed in a letter dated September 10, 1918, from the State Department to a Texas citizen who asked whether he could acquire from the United States leasehold rights on a reef in the Gulf of Mexico about forty miles from land where the water was less than one hundred feet deep where he hoped to discover a large oil pool. The Assistant Secretary stated:

"In reply the Department informs you that the United States has no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the territorial waters adjacent to the coast. Therefore, it does not appear possible for the United States to grant to you the leasehold or other property rights in the ocean bottom which you desire."<sup>83</sup>

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<sup>82</sup> Acts, 1941, 47th Cong., Reg. Sess., Ch. 286, p. 454 (Plaintiff's brief, appendix, p. 91).

<sup>83</sup> Asst. Sec. Adey to F. R. Newton, September 10, 1918, MS. Dept of State, file 312.11/8645, quoted in II Hackworth, *Digest of International Law* (G.P.O. 1941) 679, Sec. 204. The letter added:

"The Department further informs you that, unless the erection of an artificial island interfered with rights of the United States or of its citizens, or formed the subject of a complaint made upon apparently good grounds, by a foreign government, it is not likely that this Government would object to the erection by American citizens of such an island as you suggest. The Department is not in a position to procure information from other nations as to their attitude toward such a project, but it would seem that no foreign gov-

Many publicists prior to 1941 had written that subsoil resources under the high seas beyond territorial waters could be occupied and used by the owner of the shore as an extension of the land mass, or by an individual if there was no interference with navigation and the laws of his State or nation."

The State, realizing the possible benefits to State and Nation, decided to make provision for an orderly development of the resources of the area adjacent to its three-league seaward boundaries, under reign of law. To this end it extended over it the jurisdiction of its highly developed and effective conservation agencies, thereby preventing pollution and destruction of fisheries, in addition to conserving the important natural mineral resources. At the same time it devoted the monies from licensing and leasing to the support of its public schools.

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ernment would interfere with the erection of an artificial island in the Gulf of Mexico unless its interests or the rights of its citizens were injuriously affected thereby.

"It may also be observed, although the Department can give no assurances on the subject, that it would seem possible that, if an island were constructed 40 miles from the coast of the United States, by the efforts of American citizens and inhabited and controlled by them in the name of the United States, this Government would assume some sort of control over the island. However, it would seem that some special action by the President and Congress would be necessary to this end. If the island were erected, and if the United States assumed control over it, it would then be possible to take such steps as were necessary to protect the rights of the occupants."

"As representative of these see: 1 Gidel, *Le droit international public et la mer* (Paris, 1932) 508ff; J. P. A. François, "Règles générales du droit de la paix." 66 *Recueil des cours, Académie de droit international* 1, 45 (1938).



In doing so it recognized the constitutional rights of the United States and relied on its concurrence and protection. No protests were received from foreign governments nor were any made by that department of the Federal Government charged with the conduct of foreign affairs.

After the Presidential Proclamation of 1945 extending the jurisdiction of the United States over "the natural resources of the subsoil and seabed of the continental shelf," solely "from an international standpoint" which was not intended to "touch upon the Federal versus State control," the State of Texas extended its jurisdiction and boundaries to the edge of the shelf. Its action was subject to all paramount constitutional powers of the Federal Government. It was in line with the whole concept of the continental shelf being appurtenant to and properly within the jurisdiction of the government of the adjacent land. It was not thought then and is not thought now that the President intended or that the Congress would intend to make these resources a part of the nation without making them also a part of the respective adjacent states. Such has been the history of all accretions or acquisitions of property adjacent to present states of the Union.<sup>25</sup> It was the same con-

<sup>25</sup> Examples are boundary agreements with Canada on the Great Lakes whereby ownership and jurisdiction of the Great Lakes States reach more than 30 miles beneath the waters; and boundary treaties with Mexico as a result of which ownership and jurisdiction passes to Texas over tracts of land left on the Texas side by avulsive changes of the Rio Grande River. In order to remove any question that the jurisdiction in such cases passes to Texas, Congress in 1921 passed an act providing

" . . . that all lands and bancos acquired by the United States of America by virtue of its treaty

cept of federal-state relations described in a unanimous decision of the Supreme Judicial Court of Massachusetts, rendered while Mr. Justice Holmes was a member of that court, as follows:

“There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the states.”<sup>57</sup>

Also, the State had as its authority in so far as its own citizens were concerned the United States Supreme Court decision in *Skiriotes v. Florida*,<sup>58</sup> which held that a State legislature may validly fix the area in the adjacent seas within which the laws

with the United States of Mexico, of March 20, 1905, and subsequent thereto, and which lie adjacent to the territory of the State of Texas as constituted by the compromise Act of Congress of September 9, 1850, and accepted by the State of Texas on Nov. 9, 1850, shall be and become a part of the State of Texas, and shall be under the Civil and Criminal Jurisdictions of the State of Texas, and of the respective subdivisions of said State of Texas, wherein said land lies; and that lands or bancos *hereinafter* acquired by the United States of America from the United States of Mexico, by virtue of said treaty, which shall lie adjoining to the State of Texas, shall be and become a part of said State of Texas and be subject to the Civil and Criminal jurisdiction without any further enactment from the Congress of the United States.” 42 Stat. 359 (1922), 43 U.S.C. § 697 (1946).

<sup>57</sup> *Commonwealth v. Manchester*, 152 Mass. 230 at 241, 25 N. E. 113 at 116 (1890), *aff'd. sub nom Manchester v. Massachusetts*, 139 U.S. 240 (1891). To the effect that jurisdiction over the remainder of the continental shelf should be vested in the several States by virtue of their respective rights in their currently recognized territorial waters, see Borchard, “Resources of the Continental Shelf,” 40 *Am. J. Int'l L.* 59, 70 (1946).

<sup>58</sup> 313 U.S. 69 (1941).

of the State may be applied, at least as to its own citizens. In that case the State of Florida by its Constitution had defined its boundaries at three leagues from shore. Subsequently, a statute was passed regulating the taking of sponges "within the territorial limits of the State of Florida." The defendant (appellant) was prosecuted for taking sponges two marine leagues from shore in violation of the statute. In sustaining the conviction, the Supreme Court of the United States deemed it unnecessary to decide the validity of the boundary since, in the absence of conflicting Federal legislation, the State may exercise jurisdiction and control over the activities of its citizens in the adjacent high seas. The Court said:

" . . . with respect to such an exercise of authority there is no question of international law," but solely of the purport of the municipal law which established the duty of the citizen in relation to his own government. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355, 356; *United States v. Bowman*, 260 U.S. 94; *Cook v. Tait*, 265 U.S. 47; *Blackmer v. United States*, 284 U.S. 421, 437.

"If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the

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<sup>22</sup> In a footnote at this point, the court cites Oppenheim, *International Law*, 4th ed., Vol. 1, Sec. 145, p. 281; Story, *Conflicts of Laws*, 8th ed., Sec. 540, p. 755; Moore's *International Law Digest*, Vol. II, p. 255, 256; Hyde, *International Law*, Vol. I, Sec. 240, p. 424; Borchard, *Diplomatic Protection of Citizens Abroad*, Sec. 13, pp. 21, 22.

State has a legitimate interest and where there is no conflict with acts of Congress. Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign. . . .

"There is nothing novel in the doctrine that a State may exercise its authority over its citizens on the high seas. That doctrine was expounded in the case of *The Hamilton (Old Dominion S. S. Co. v. Gilmore)*, 207 U.S. 398."<sup>89</sup>

By the same token, at least as to its own citizens, no question of the validity of the Texas boundary extension act arises. They were not then, and are not now, in conflict with any Act of Congress, and so far as we know they have not been objected to by any foreign nation.

For the purpose of this suit plaintiff has assumed the validity of the Texas boundary extensions to the edge of the continental shelf. In fact, the complaint uses these boundaries and refers to them as the boundaries of Texas in describing the land sued for. The complaint also recognizes for the purpose of this suit that the State has legislative and police powers over the area the same as over its land territory. For the purpose of this suit, the State of Texas admittedly has the same governmental powers over the natural resources of the subsoil of the continental shelf outside of its original three-league boundaries as within those boundaries.

### *Effect of the Proclamations*

It is certain that the Presidential Proclamations and Executive Orders of September 28, 1945, do not

<sup>89</sup> *Skiriotes v. Florida*, *supra*, at 73, 77.



even pretend to prohibit state legislation in the field or to change the municipal law of the United States.

Two Proclamations relating to the continental shelf were issued by the President on September 28, 1945. They were described in a White House press release published in the *Department of State Bulletin*, September 30, 1945,<sup>90</sup> as follows:

"The President issued two proclamations on September 28 asserting the jurisdiction of the United States over the natural resources of the continental shelf under the high seas contiguous to the coasts of the United States and its territories, and providing for the establishment of conservation zones for the protection of fisheries in certain areas of the high seas contiguous to the United States. The action of the President in regard to both the resources of the continental shelf and the conservation of high-seas fisheries in which the United States has an interest was taken on the recommendation of the Secretary of State and the Secretary of the Interior."

The proclamations merely assert a policy of the United States with respect to fisheries on the high seas contiguous to the United States and with respect to the natural resources of the subsoil and seabed of the continental shelf "beneath the high seas but contiguous to the coasts of the United States." Various reasons are assigned by the President for assuming jurisdiction and control over the resources, but none purport to relate to domestic law or to create rights in the Federal Government against the States or to authorize the exercise of regulatory powers by the

<sup>90</sup> 13 Dept. State Bull. 484.

Federal Government beyond those provided for in the Constitution. By their own terms, the Proclamations must be viewed only as a formulation of international policy—a means of placing other nations on notice of the policy to be pursued by the United States. Such was the interpretation given the Proclamations in the White House press release and the Executive Order contemporaneously issued and quoted above.

As heretofore shown, the Proclamations confine themselves to the field of foreign affairs. In that field, they serve a useful purpose. Texas and Louisiana had previously entered the field of regulating fisheries and licensing and regulating the production of oil and gas from the subsoil of the continental shelf beyond the marginal sea. The Proclamations had the effect of placing other nations on notice that the United States considers *vis-a-vis* the nations of the world that it has jurisdiction and control over the fisheries and subsoil resources of the continental shelf. The subsoil resources proclamation was tantamount to a declaration that this nation will not recognize the right of any other nation to exploit the natural resources of the subsoil of the continental shelf, some of which are being regulated, developed, and conserved under the laws of Texas and Louisiana. It was not issued as a means of notifying other nations of the domestic policy to be pursued between the United States and the several States of the union, or between the United States and its citizens.

The international policy proclaimed, like all international policies, concerns the rights of nations as such, and not the rights of political subdivisions and

individuals who are unknown in the conduct of foreign affairs. Their rights, duties and obligations are defined by their respective governments, according to their own internal laws.

As a domestic matter, the proclamations have only a limited effect. They serve to notify the States that the President may at some future time request Congress to enter a field that the States have occupied. But the President, without congressional authority, did not attempt to enter the United States into that new field to the exclusion of the States, as was specifically stated in his Executive Order and press release of the same date. Such an attempt would have been without effect.

Presidential proclamations issued without constitutional or congressional sanction have no force of law. *Muir v. Louisville & N. Ry.*, 247 F. 888, 895 (D. C. Ky. 1918). The President cannot, acting without the concurrence of Congress, annex territory<sup>91</sup> or extend the boundaries of the United States.<sup>92</sup>

The case of *Toomer v. Witsell*, 334 U. S. 385 (1948),<sup>385</sup> decided after *United States v. California*, concerned the power of South Carolina to regulate fishing in the marginal sea after President Truman's Proclamation asserting jurisdiction over high-sea fisheries adjacent to the coasts of the United States. In that case the court held that since Congress had not entered the field with conflicting legislation, the State

<sup>91</sup> *Fleming and Marshall v. Page*, 9 How. 603, 614, 615 (1850); *The James G. Swan*, 50 F. 108, 110, 111 (1892).

<sup>92</sup> *Foster and Elam v. Neilson*, 2 Pet. 253, 307 (1829); *United States v. Arredondo*, 6 Pet. 691, 711 (1832).

of South Carolina, even without ownership, had the "power to preserve and regulate the exploitation" of this important resource. The Court said:

"The appellants too press a contention which, if correct, would dispose of the case. They urge that South Carolina has no jurisdiction over coastal waters beyond the low-water mark. In the court below *United States v. California*, 332 U.S. 19, 91 L. ed. 1889, 67 S. Ct. 1658 (1947), was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claim, had paramount rights in the three-mile belt, the Court pointedly quoted and supplied emphasis to a statement in *Skiriotes v. Florida*, 313 U.S. 69, 75, 85 L. ed. 1193, 1199, 61 S. Ct. 924 (1941), that 'It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the [state] statute so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the state.'

"Since the present case evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power, the District Court properly concluded that the State has sufficient interests in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery." 334 U.S. at 393.

Of course, if Congress should enter the field and exercise regulation and control in conflict with State laws, the United States would stand in a different



position in that portion of this suit involving lands outside of Texas' original boundaries. But, as indicated in *Toomer v. Witsell*, *supra*, until Congress exercises its paramount governmental right to regulate and control the removal of the natural resources of the subsoil of the continental shelf within the extended boundaries of Texas, the State is free to legislate and continue the exercise of its powers. As said by the Court in *Manchester v. Massachusetts*, 139 U.S. 240, 266 (1891):

"The pertinent observation may be made that, as Congress does not assert, by legislation, a right to control pilots in the bays, inlets, rivers, harbors and ports of the United States, but leaves the regulation of that matter to the States, *Cooley v. Board of Wardens*, 12 How. 299, so, if it does not assert by affirmative legislation its right or will to assume the control of of menhaden fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays.

"We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the Statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State."

The Proclamations and Executive Order 9633 not having been issued with congressional sanction or concurrence, they do not in any way impinge on the

rights or general legislative power of the State, or the rights of American citizens, nor can they serve as a basis for the control of their conduct.

The only congressional action on the subject since the Proclamation and since the *California* decision was the adoption of an amendment to a law extending the Federal Mineral Leasing Act to "heretofore or hereafter acquired" lands not then covered by the Act, which amendment specifically provided that the Act shall not apply to minerals in "submerged lands . . . or the continental shelf." This was at a time when it was well known to Congress that Texas and other States were regulating the exploration and conservation of minerals therein.

In *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941), the Court said:

"Congress having occupied but a limited field, the authority of the State to protect its interests by additional or supplementary legislation otherwise valid is not impaired."

It was Congress, and not the President, who had occupied but a limited field. To hold that the United States has as against Texas the exclusive interest in the resources claimed in plaintiff's brief, and that the President can extend the laws of the United States to cover such interest, is to hold that the President can by the issuance of a Proclamation make the doing of an act a trespass which was theretofore lawful. In the words of Lord Coke, "they [proclamations] cannot create any offense which was not one before." *Case of The Proclamations*, 77 Eng. Rep. 352 (1610). This the President plainly said that he did not even intend by his Proclamations.

The question of whether the United States should enter the field, restricting State action, is a political question for Congress to decide, and when it acts it can then adjust between the parties their equities, and the equities accruing to those who have discovered valuable deposits of resources under licenses issued by the State. This controversy, involving political questions, is of the nature in which this Court has refrained from acting or has declared beyond the jurisdiction of courts to decide. *Cf. Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948); *United States v. Palmer*, 3 Wheat. 610 (1818); *Coleman v. Miller*, 307 U.S. 433 (1939).

In no event has plaintiff shown such an exclusive interest against Texas as will support an injunction restraining Texas from preserving and regulating development of these lands and minerals until such time as Congress may act in a manner which conflicts with the action of the State.

### *The Public Interest*

It would be against the public interest for the Court now to enjoin the State of Texas from its regulation and control of the resources involved. One of the moving forces behind the Presidential Proclamation was stated that

“ . . . the United States, . . . aware of the long-range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged. . . . ”<sup>13</sup>

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<sup>13</sup> 13 Dept. State Bull. at 485 (1945).

Those words were written almost five years ago. During that entire time the Congress has failed to enact legislation which would accomplish the encouragement of the discovery and availability of these resources. The State entered the field even before the Proclamation with legislation which not only encouraged the development but regulated it under sound conservation policies which prevent waste, pollution, and other harm to the waters, fisheries, and beaches. Some governmental authority should be allowed to continue with legislation and regulation in this field. It would not serve the public interests to permit individuals or corporations to operate therein without regulation and payment of rentals and royalties.

That such action as prayed for here is not in the public interest is best evidenced by the fact that the United States has not sued the individuals and corporations making the explorations on the lands, and neither have they stopped the development of private lessees nor the supervision, regulation, and leasing in the California marginal belt since the *California* decision in 1947. Although this Court held that the United States was entitled to an injunction, it was not issued because the "public interest" demanded continued development of the resources. Therefore, shortly after the *California* decision, the Secretary of the Interior, the Attorney General of the United States, and the Attorney General of California entered into a stipulation under which lessees holding State leases in California's marginal sea were permitted to continue operations and the State was allowed to continue leasing and collection of revenues



(impounding the State revenues in a special fund, but not the proceeds received by the lessees), pending congressional action or the entry of a final decree."<sup>94</sup> In transmitting this stipulation to the President the Attorney General wrote that such arrangement was necessary "to protect the public interest" and "to deal with such problems as could not await Congressional and further judicial action." He said further:

"The opinion of the Supreme Court last June gave rise to a variety of unusually complex problems. The most pressing of these was the urgent need of assuring continued oil production in the coastal waters off California. Continued oil production was necessary in the interest of the United States. . . ."<sup>95</sup>

This agreement by federal officials who do not have control over United States property adds no validity to the operations of the State of California in the California marginal belt. If it is lawful and in the public interest for the State of California to continue its regulation, control, and leasing in the area covered by this Court's decision in the *California* case, it is by the same token lawful for Texas to continue similar actions in the area covered by this point.

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<sup>94</sup> Appendix B, Memorandum in Support of Proposed Decree, *United States v. California*, No. 12, Original, October Term, 1946, Appendix, p. 12.

<sup>95</sup> See Copy of letter from Attorney General Clark to President Truman, October 30, 1947, in Supplemental Statement and Brief for the State of Texas in Support of Objections to Motion for Leave to File Complaint, Appendix A, p. 33.

f. In any event, Texas should not be prohibited from exercising its legislative power to "preserve and regulate the exploitation of an important resource" within its borders, in the absence of conflicting national legislation. See *Toomer v. Witsell*, 334 U.S. 385, 492 (1948).

Even if it be assumed (contrary to what the evidence will show) that the land and minerals in suit are not owned by Texas, and that they are not owned by the United States, but that the United States has a paramount governmental right to preserve, regulate, and control their exploration and development, Texas is still free to act in the matter until Congress exercises the power of the Federal Government in a manner which conflicts with State legislation. See *Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

If there is no ownership of the lands and minerals of the marginal belt, then there is no valid distinction, other than one of degree, between one natural resource and another. The right and power of the State, in the absence of national legislation, may be exercised as to oil as well as to fish. No claim is made that Congress has entered the field or attempted to exercise any paramount powers which may be held by the Federal Government over these resources.

In fact, as heretofore shown, Congress on several occasions, with full knowledge of the legislation and activities of this State and other States, has declined to enter the field. The only positive congressional action since the *California* decision has consisted of (1) the adoption of legislation specifically stating that the only federal mineral leasing law then in existence should not apply to the marginal belt and continental shelf (30 U.S.C. § 352; see footnote 85, p. 208); (2) House and Senate Judiciary Committee

reports and a House vote of 257 to 29 in favor of State ownership, regulation, and control of these lands and resources (See p. 171, *ante*), and (3) approval of a Gulf States Marine Fisheries Compact which recited that "The Gulf Coast states have the proprietary interest in and jurisdiction over fisheries in the waters within their respective boundaries." (Public Law 66, 81st Cong., 1st sess., ch. 128.)<sup>541</sup>

In *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941) the Court ruled that the Florida statute as applied to conduct within the territorial waters of Florida in the absence of conflicting Federal legislation, was within the police power of the State. This was quoted with emphasis in *United States v. California*, 332 U.S. at 38, and again in *Toomer v. Witsell*, 334 U.S. at 393.

In support of the rule announced by Chief Justice Hughes in *Skiriotes v. Florida*, he cited (under "see also") among others his noted opinion in the *Minnesota Rate Cases*, 230 U.S. 353 (1913). The rule of the latter case is grounded in Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 9 Wheat. 1 (1824). We are hardly at liberty to suppose that the Court in the *California* case or again in *Toomer v. Witsell*, in quoting from *Skiriotes v. Florida* intended to announce a departure from or a modification of a rule that is so deeply rooted in the jurisprudence of the nation. Under that rule, the National Government cannot exclude the State of Texas

<sup>541</sup> This bill was amended in the House to make certain that it was not intended to limit or add to the powers or proprietary interest of any signatory state. 95 Cong. Rec. 1875 (March 3, 1949).

from legislative jurisdiction by claiming superior governmental power, unless the power has been asserted by the legislative branch of the Federal Government.

The Texas legislation attacked by this suit is not challenged on the ground that it offends any Federal Constitutional limitation upon State power. Such was the basis of the attack upon the South Carolina statutes in *Toomer v. Witsell*. In the absence of such challenge, and since it is not claimed that the Congress has enacted conflicting legislation, the plaintiff is not entitled to prevail if it has no proprietary rights in the lands and minerals underlying the marginal belt within the original borders of Texas. Plaintiff has not shown such proprietary interest as a matter of law, and therefore the motion for judgment should be overruled.

The public interest and additional cases relating to this point are fully discussed in the preceding argument with reference to that part of the continental shelf lying outside of the State's original boundaries.

**2. SUMMARY OF FACTUAL CONCLUSIONS MADE BY PLAINTIFF AND THE CONTRARY FACTS WHICH DEFENDANTS' EVIDENCE WILL SHOW AT A FULL TRIAL.**

Plaintiff has attempted to raise fact issues on the value, claim, and use of these lands during and since the days of the Texas Republic; the customs and usages of nations as to the extent of boundaries and ownership of lands beneath the marginal belt; the intention of the parties to the Annexation Agreement; and many other issues which require that



plaintiff's motion for judgment on the pleadings be overruled in order that defendant may have an opportunity fully to develop its evidence. Defendant has listed many of the fact assumptions or conclusions relied upon by the United States in its brief. (See page 65 of Memoranda and Appendix included in this brief.)

The Court may take judicial notice of the status of international law and the practices of nations as to marginal sea boundaries and bed and subsoil ownership as it existed in 1836-1845, but since plaintiff disputes the status of this law and practice as claimed by defendant, it is proper that evidence be heard to determine the true practices, customs, and usages which comprised international law of the period. The Court often has gone to the publicists for this information, but the testimony of experts who have devoted their lives to the study of the practice is also proper. Defendant desires at trial to offer in support of its contentions some of the world's leading experts in the field of international law. In *Oklahoma v. Texas*, 253 U.S. 465, 471 (1920), a controversy as to the ownership of a riverbed in which the status of international law as of the years 1819, 1828, and 1838 was pertinent, this Court ordered that evidence be taken

“ . . . in respect of the governmental practice on the part of all governments and states concerned at the time, bearing upon the construction and effect of the said treaty.”

Such a procedure is likewise necessary and appropriate in this case.

**3. THE NATURE AND DISPUTED CHARACTER OF THE FACTS INVOLVED RENDER THEIR PRESENTATION AND DETERMINATION BY JUDICIAL NOTICE IMPOSSIBLE**

As previously discussed under Point II, C, even if the plaintiff had set out the facts which it desired to have judicially noticed, the defendant would be entitled to show that they are disputable and to introduce controverting proof at trial. As a matter of law the defendant cannot present its case through judicial notice since obviously the basic facts in support of defendant's position are disputed by the plaintiff. And as a matter of fact, the defendant cannot do so since the nature and quantum of defendant's proof make it impracticable, if not impossible, to present its evidence fully in a logical and intelligible manner in its brief within the time allowed.

The majority of the facts included in plaintiff's brief have been shown to be disputable. The plaintiff in its brief has raised issues of fact as to the intention of the parties to the Annexation Agreement, the Convention of 1838, the treaty of Guadalupe Hidalgo, the treaties between Texas and different nations recognizing its independence, and various treaties and agreements. It has contended that the Republic of Texas did not claim ownership of the subsoil of the seabed within three marine leagues of its coast and that the customs and usages of nations in the period from 1836 to 1845 would not allow it effectively to do so.

The defendant has shown in this brief the nature of the basic facts upon which it relies to show the error of plaintiff's proposed conclusions of fact. In

addition to the material presented, the defendant has available a great amount of evidence bearing upon these facts. This material consists of diplomatic correspondence, congressional debates, histories, diaries, newspaper accounts, letters, maps, deeds, and oral testimony. The defendant has not had sufficient time, nor is it feasible, nor should it be required, to develop its evidence in such detail as to present the full factual basis of its case through the medium of a brief. Such a presentation cannot be made properly and effectively. It requires a trial for the coherent and complete development of all pertinent facts, followed by briefs and arguments directed to the trial record.

The State, as it has since the beginning of this case, desires to introduce this evidence. It also anticipated that plaintiff would necessarily rely upon fact issues, and defendant sought the most convenient and efficient means of developing a record for appellate or original review by this Court. When Texas opposed the motion for leave to file the complaint, it asked that the motion be overruled without prejudice to the filing of the complaint in a district court.<sup>97</sup> Assuming that this Court did not have the time to hear the evidence *en banc*, defendant suggested that it could be developed with greater convenience and efficiency in a district court.<sup>98</sup> If the Court should decide such a course to be desirable, we

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<sup>97</sup> Federal district courts were given concurrent jurisdiction of all cases between the United States and a State by revised Title 28, U.S.C., § 1251, § 1345.

<sup>98</sup> See Supplemental Statement and Brief for the State of Texas in Support of Objections to Motion of the United States for Leave to File Complaint, April, 1949, pp. 23-32.

agree that the pleadings may be forthwith filed in a district court, and that the case be then considered at issue so that it would be able to proceed promptly to trial.

On the other hand, if the Court deems appointment of a special master more advisable, Texas will be ready to proceed promptly before him. When Texas filed its answer on November 8, 1949, it filed therewith a motion for appointment of a master. This motion is still before the Court, presumably pending the determination of the motion for judgment.

**E. The Established Practice of this Court in Original Actions, and for Federal District Courts, Allows Full Development of All Factual Issues.**

*Practice of This Court in Original Actions*

This Court has held that the more important the case and the more impacts to be expected from its decision, the more inappropriate is the case for the application of summary procedure. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426 (1947). As far as we can ascertain, the case at bar involves the largest area of land ever the subject of litigation before an American court. It calls for adjudication of the intention of two independent nations in making an agreement of union. It involves lands claimed, possessed, used, and enjoyed by the defendant for over 100 years in accordance with its understanding of the agreement, and without previous dispute by the plaintiff.



In the exercise of its original jurisdiction this Court has consistently allowed a defendant State full and adequate opportunity to develop its defenses, including the submission of evidence, at a trial for that purpose. This Court has fully appreciated that in exercising its original jurisdiction it sits as a *nisi prius* court of last resort, and that in the proper discharge of its duties it must examine the case with scrutinizing care and caution after it has allowed full and thorough development. This Court has zealously guarded against action which might prejudice the high parties before it. In *Kansas v. Colorado*, involving conflicting State claims to rights in an interstate stream, this Court in ruling on a demurrer to the bill, held that it would not compel amendment "whatever imperfections a close analysis of the pending bill may disclose," nor would it "proceed on the mere technical admissions made by the demurrer," but would overrule the demurrer so that the case could go to issue and proofs. 185 U.S. 125, 144, 145, 147 (1902). Chief Justice Fuller stated:

"Applying the principles settled in previous cases, we have no special difficulty with the bare question whether facts might not exist which would justify our interposition, while the manifest importance of the case and the necessity of the ascertainment of all the facts before the propositions of law can be satisfactorily dealt with, lead us to the conclusion that the cause should go to issue and proofs before final decision.

" . . . 'A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hear-

ing; but it must be founded on this: that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill; and those established by the evidence, may either incline the court to modify the relief or to grant no relief at all, the court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer.

“Advancing from the preliminary inquiry, other propositions of law are urged as fatal to relief, most of which, perhaps all, are dependent on the actual facts. The general rule is that the truth of material and relevant matters, set forth with requisite precision, are admitted by demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem to us wise to apply that rule, and we must decline to do so.

“The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence.”<sup>90</sup>

The principles of liberality here applied were earlier stated in the boundary action between *Rhode Island v. Massachusetts* as follows:

“ . . . in a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the court to mould the rules of chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits. It is too important

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<sup>90</sup> *Kansas v. Colorado*, 185 U.S. 125, 144, 145, 147 (1902).

in its character, and the interests concerned too great, to be decided upon the mere technical principles of chancery pleading. . . . And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength.<sup>100</sup>

In *Iowa v. Illinois* the Court said:

“In the exercise of original jurisdiction in the determination of the boundary line between sovereign states, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded.”<sup>1</sup>

Chief Justice White said in *Virginia v. West Virginia*:

“As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between States, involving grave questions of public law, determinable by this Court under the exceptional grant of power conferred upon it by the constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled, and we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of as come ultimately it must, in the absence of

<sup>100</sup> 14 Pet. 210, 257 (1840).

<sup>1</sup> 151 U.S. 238, 242 (1894) (vacating the Court's order confirming the report of commissioners).

agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard, has in any degree entered into the disposition of the case."<sup>2</sup>

The guiding principles of these decisions have been applied, whether the action be by the United States against a State or by a State against another State, to the end that all parties have been given full and fair opportunity to develop their claims and defenses, including the taking of testimony where that was desired. Thus in the prior boundary dispute between the United States and Texas proof was taken where the history of the period had a bearing on the decision. *United States v. Texas*, 443 U.S. 621 (1891) and *United States v. Texas*, 162 U.S. 1 (1896). When the United States sued to quiet title to land in Oregon, according to the opinion "voluminous testimony" was taken by a special master. *United States v. Oregon*, 295 U.S. 1 (1935). Similarly, in an action by the United States to quiet title to the beds of rivers in Utah, this Court appointed a special master, documentary evidence was introduced, and both parties presented the oral testimony of numerous witnesses as to the topography of the rivers, their history, etc. *United States v. Utah*, 283 U.S. 64 (1931).<sup>3</sup> When the United States sued to

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<sup>2</sup> 234 U.S. 117, 121 (1914). The extreme forbearance and care with which the Court proceeded in the Virginia-West Virginia litigation is common knowledge.

<sup>3</sup> For a list of the numerous witnesses on both sides, see the index of Utah's reply brief.



establish title to certain land in Wyoming and to proceeds of the oil taken therefrom, a special master to hear testimony was appointed. *United States v. Wyoming*, 331 U.S. 440 (1947).

Likewise, when States have come to this Court in disputes with another State, evidence has been taken, when offered, to explain and develop either the claim or defense. In a boundary suit between Vermont and New Hampshire this Court appointed a special master and said that it considered the history of the subject from the creation of New York and New Hampshire as adjoining royal provinces to the admission of Vermont as a State and also the subsequent acts and claims of Vermont and New Hampshire respecting the subject down to the present time. *Vermont v. New Hampshire*, 289 U.S. 593 (1933). In a boundary dispute between Louisiana and Mississippi, the history of the subject was considered, and the Court stated:

"The cause being at issue, much evidence, documentary and otherwise, was taken . . ."  
*Louisiana v. Mississippi*, 202 U.S. 1, 21 (1906).

Similarly, evidence was taken in a boundary dispute between the States of Arkansas and Mississippi. *Arkansas v. Mississippi*, 256 U.S. 28 (1921). In *Oklahoma v. Texas*, involving a controversy as to the ownership of a river bed wherein oil and gas had been found, the United States was allowed to intervene, and the Court ordered that evidence be taken "in respect to the governmental practice on the part of all governments and States concerned at the time

bearing upon the construction of the treaty." 252 U.S. 372 (1920); 253 U.S. 471 (1920); 260 U.S. 606 (1923).

In a boundary dispute between Indiana and Kentucky both States used aged witnesses. *Indiana v. Kentucky*, 136 U.S. 479, 509 (1890). Likewise, in a suit to determine the ownership of the bed of the Delaware River and the boundary between Delaware and New Jersey, a special master was appointed. *New Jersey v. Delaware*, 291 U.S. 361 (1934). A special master was appointed and testimony taken on a boundary question involving Michigan and Wisconsin. *Michigan v. Wisconsin*, 270 U.S. 295 (1926). When North Dakota sought to enjoin Minnesota from the use of certain drainage ditches, the testimony of witnesses, including farmers and engineers was taken. *North Dakota v. Minnesota*, 263 U.S. 365 (1923). In a boundary dispute based on a sudden change in 1821 of the course of the Mississippi River, a special master was appointed who took testimony and received other evidence. The history of the subject matter was deemed important as an aid in the determination of the case. *Arkansas v. Tennessee*, 310 U.S. 536 (1940). Similarly, testimony was taken in *Texas v. Florida*, 306 U.S. 398 (1939), to determine the domicile of a decedent for inheritance tax purposes.

We have been able to find only four original proceedings involving States which have gone to judgment without a trial for the purpose of taking evidence. *United States v. North Carolina*, 136 U.S. 211 (1890), an action of debt on state bonds, came on for hearing upon facts stipulated by the parties; in *Iowa v. Illinois*, 147 U.S. 1 (1893), 151 U.S. 238 (1894), 202 U.S. 50 (1906), a commission to deter-

mine a boundary was appointed after the facts were admitted; and in *United States v. Minnesota*, 270 U. S. 181 (1926), a suit to cancel land patents, the parties voluntarily submitted their case on pleadings and documentary evidence. This was equally true in *United States v. California*, 332 U.S. 19 (1947), involving title to the lands offshore the coast of California. In its own words, defendant California included within its brief a "presentation of its entire case, both upon the law and the facts." (Foreword, Defendant's Brief, *United States v. California*.) This is a feat which, because of the extent and nature of its evidence, the State of Texas has insisted from the beginning, and now shows the Court it cannot accomplish through the medium of a brief. See p. 225 et seq., *infra*. Further, it has moved this Court, and the motion pends, for leave to take oral depositions of certain aged witnesses whose testimony is relevant to the issues in this case. Furthermore, as we point out in detail under the discussion of Judicial Notice, *ante*, there is a vast amount of other relevant testimony which Texas desires to offer in connection with the use of the lands in question during the time it was a Republic and subsequent thereto, diplomatic correspondence, testimony of experts on international law, and related proof relative to the Annexation Agreement and other issues in this case. Mr. Justice Black, who spoke for the Court in *United States v. California*, and who has long championed the right of all defendants to a full and fair trial, carefully pointed out:

"Neither [the United States nor California] has suggested any necessity for the introduction of evidence. . . ." *United States v. California*, 332 U.S. 19, 24.

In summary, the only instances in which a trial has been dispensed with in an action involving this Court's original jurisdiction have been where the taking of evidence was unnecessary because of stipulation or agreements as to the facts or evidence and there was no objection or intimation by the defendant State that it desired a hearing for the purpose of taking evidence.

### *Practice in Federal District Courts*

The practice which this Court has established for the *nisi prius* district courts is in point; for in the case at bar this Court sits as a *nisi prius* court. A motion for judgment on the pleadings is denied unless it is certain that there is no issue of fact, and any doubt as to the existence of such an issue is resolved against the moving party; and on a motion for summary judgment based on matters dehors the pleadings, the motion is denied unless it is indisputably clear that there is no genuine fact issue.<sup>4</sup> Both motions are harsh in that they foreclose any development of the factual issues at trial. These are elementary principles for the disposition of litigation involving only private matters. In cases that involve public issues that are large or complex, this Court has gone further and expressly cautioned against any summary disposition. Thus, in *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426, 434 (1947), Mr. Justice Frankfurter stated:

"Caution is appropriate against the subtle tendency to decide public issues free from the

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<sup>4</sup> See pp. 43 et seq., *supra*.



safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment."

And in *Kennedy v. Silas Mason Co.* Mr. Justice Jackson spoke for the Court as follows:

"... No conclusion in such a case should prudently be rested on an indefinite factual foundation. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice."

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." 334 U.S. '249, 256-257 (1948).

Since the Court has consistently refused to allow an original action to be decided on the pleadings without the consent of the parties and has established a similar rule for the district courts in cases of public import, we feel that in a case of this magnitude and of such public importance the Court

should overrule the plaintiff's motion for judgment or, in the alternative, should defer its disposition in accordance with the principles to which we now turn.

**III. Because of the Importance of this Case and the Related Fact Issues, If the Motion for Judgment Is Not Now Overruled, Its Disposition Should Be Deferred Until The Evidence Is Fully Developed.**

As previously discussed, under the consistent and established practice of this Court for cases involving its original jurisdiction, this Court has allowed full and complete development of all issues and has refused to subject pleadings to technical scrutiny to the end that the case could go to issue and proofs. In other words, this Court has denied or deferred to trial motions of the character now presented by plaintiff.

"We arrive at the same end if the principles of the prior equity practice or those of the present Federal Rules of Civil Procedure are applied. Under the prior equity practice the court said, in *Dixon v. Hopkins*,

"Federal Courts are inclined, without subjecting the bill to an overcritical or minute analysis, to allow a case in equity involving important matters to go to issue and proof where a doubtful question is raised by the pleadings."

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<sup>5</sup> 56 F. 2d. 783, 784 (C.C.A. 5th, 1932), citing *Krouse v. Brevard Tannin Co.*, 249 Fed. 538 (C.C.A. 4th, 1918); *American Creosote Works v. Powell*, 298 Fed. 417, 422

Under the present Federal Rules, Rule 12(d) authorizes a district court to order that the hearing and determination of defensive motions and a motion for judgment on the pleadings be deferred until the trial. As that rule is applied, a district court, if the present action were there pending, would defer determination of the issues in this case until trial.

“Certainly it will be advisable generally to decide such defenses as lack of jurisdiction over the subject matter, lack of jurisdiction of the person, improper venue, insufficient process or service of process, or failure to join an indispensable party, promptly after they are raised, and not defer them to the trial. On the other hand, where determination of the defense will involve going into the merits, the question may well be reserved until trial. The rule is not intended to permit ‘fragmentary and separate trials of issues that require coherent presentation for their just determination.’

“It will often occur that the court feels that issues raised by a motion to dismiss for failure to state a claim under (b) (6), or by a motion for judgment on the pleadings, are of such grave consequence that it is better not to decide them without full consideration of all the facts that can be adduced at trial.”<sup>6</sup>

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(C.C.A. 5th, 1924), cert. den. 265 U.S. 595 (1924); *Kansas v. Colorado*, 185 U. S. 125 (1902). Other representative cases prior to Federal Rules: *O’Keefe v. City of New Orleans*, 273 Fed. 560 (E.D. La. 1921), aff’d 280 Fed. 92 (C. C. A. 5th, 1922); *Shredded Wheat Co. v. Kellogg Co.*, 26 F. 2d 284 (D. Conn. 1922).

<sup>6</sup> 2 Moore’s Federal Practice (2d ed.), ¶ 12.16, pp. 2274-2275. Accord in principle, 5 Cyclopaedia of Federal Procedure (2d ed.) § 1783.

This Court has held that where the determination of a motion to dismiss would raise grave constitutional issues, the motion should be deferred until trial. *Gibbs v. Buck*, 307 U.S. 66 (1939); *Polk County v. Glover*, 305 U.S. 5 (1938). Where plaintiff sued to enjoin the collection of the social security tax and defendant moved to dismiss on the ground that injunctive relief was prohibited by the Internal Revenue Act, the determination of the motion was deferred until the trial on the merits. *Kaus v. Huston*, 35 F. Supp. 327 (N. D. Iowa 1940). The court stated:

"In considering this question the matter of procedure is first thrust upon the court. It is contended by the defendant that the court is obligated to rule upon its motion to dismiss without proceeding to a trial upon the merits. I think in this respect counsel for the defendant fails to appreciate that in the instant case the question presented by the motion and the so-called merits of the case are identical. . . . Rights of action as set forth in pleadings are not always so definite and inclusive as to preclude the necessity of further light from the evidence, hence, this Rule [12(d)] I think is intended to permit the court to take a larger scope of vision than that merely stated in the pleading." 35 F. Supp. 327, 330.

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<sup>7</sup> For other cases in accord, see *Equitable Life Assurance Society v. Kit*, 26 F. Supp. 880 (E.D. Pa. 1939) (motion for judgment on the pleadings, raising question as to effectiveness of attempted change of beneficiary, deferred until trial); *Montgomery Ward & Co. v. Schumacher*, 3 F.R.D. 368 (N.D. Cal. 1944) (question of law novel; damages sought were large); *Sbicca-Ded Mac, Inc. v. Milins Shoe Co.*, 36 F. Supp. 623 (D. Mass. 1940); *Liquid Carbonic Co.*



That the case at bar presents a situation within the purview of Rule 12(d) is clearly apparent from the brief filed herein by plaintiff on February 20, 1950. There can be no doubt that plaintiff's brief presents argument on every major point which would be considered in a full hearing on the basis of fact and law. It is certain that plaintiff has not separated its law arguments from its arguments of fact, and, as we have pointed out, it is unlikely that it could have done so. The State of Texas believes that in line with the prior practice of this Court, the practice of other Federal Courts, and the important issues of fact and law evident from the pleadings and the plaintiff's brief, and further pointed out in this brief, the Court should now overrule the motion for judgment, or, in the alternative, defer consideration of the issues raised thereby until trial.

### CONCLUSION

Plaintiff's motion for judgment should now be denied, and the case should go to trial for the presentation of all pertinent evidence. If not denied, determination of the motion should be deferred.

Defendant's pending motion for the appointment of a master should be granted, unless the Court now deems a district court to be a more convenient and appropriate forum for trial, in which event the de-

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*v. Goodyear Tire & Rubber Co.*, 39 F. Supp. 520 (N.D. Ohio, 1940); *Banks v. King Features Syndicate, Inc.*, 30 F. Supp. 352 (S. D. N.Y. 1939); *Park In Theaters, Inc. v. Paramount-Richards Theatres, Inc.*, 81 F. Supp. 466 (D. Del 1948); *Hawn v. American Steamship Co.*, 26 F. Supp. 428 (W.D. N.Y. 1939); 2 Moore, *op. cit. supra*, ¶ 12.16; 5 Cyc., *op. cit. supra*, ¶ 1783.

fendant agrees that the pleadings may be forthwith filed in a district court, and that the case be then considered at issue so that it may proceed promptly to trial in the district court.

Respectfully submitted,

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March 25, 1950

# Rights Involved In United States v. Texas

BY ROSCOE POUND

I shall treat the rights involved here as within the terms of ownership or proprietary rights (*dominium*) as distinguished from governmental powers of regulation and control (*imperium*).

The rights in controversy constitute proprietary substance whether described by the term "ownership" or "paramount rights." At issue is the ownership of the subsoil resources and minerals "underlying" the waters of the Gulf of Mexico within the boundaries of Texas or the right to develop, use and dispose of them for profit.

There is no controversy over the waters or the governmental power to regulate, conserve, or control their use, or the use of the sea bed and subsoil, to insure against interference with public rights of navigation and constitutional federal powers. These governmental powers are *imperium* over the waters and submerged lands. They are paramount to but distinguishable and separable from proprietary rights in the subsoil.

To remove all doubt about the nature of the rights claimed, the United States refers to them as full ownership or dominion, or

"whatever is the most accurate description of the right to take and enjoy the complete benefit of the mineral and other resources of the bed of the sea." (Plaintiff's brief, p. 16.)

There is no need for a more accurate description than "ownership," although the ownership may be qualified and limited by reason of the paramount governmental powers which relate to the overlying waters and with which exercise of the ownership and

use of the underlying subsoil must not conflict.

According to the civilians, *dominium* includes *jus possidendi* (a right of possessing), *jus utendi* (a liberty of using), *jus fruendi* (a liberty of enjoying the profits and avails), *jus abutendi* (a liberty of destroying), *jus disponendi* (a power of disposing of the thing owned), and *jus prohibendi* (a right of excluding others). Hearn, *Theory of Legal Duties and Rights*, Chap. 10, § 1, p. 186 (1883). The right to take or liberty of taking minerals from below the surface is an incident of ownership—of *dominium*. At common law the taking of minerals from below the surface is called a profit. It is an exercise of the owner's liberty of enjoying the land. The civilians put it as an exercise of his *jus fruendi*.

*Dominium* or ownership is the description applied by substantially all jurists and publicists since the seventeenth century to denote the sovereign's original right to the subsoil underlying the marginal sea belt with its territory. (See chronological list of these writings from 1670 to 1950 in Appendix to this brief.)

This *dominium* ("complete benefit of the mineral and other resources of the bed of the sea") is to be distinguished from the sovereign's *imperium* (right to regulate, control, police, and conserve) in the overlying waters and its prevention of conflict between the owner's use of the bed and the public interests of navigation, safety, health, peace, order, and morals.

This distinction between the sovereign's *imperium* over and *dominium* in the marginal sea belt is also recognized by substantially all publicists since the seventeenth century. (See chart in Appendix.) It is recognized in other property possessed by governments for public purposes, e. g., highways and rivers.



I have said that a government has *imperium* over this nature of public property rather than *dominium*. That is because a government cannot possess, dispose of, or use to the exclusion of its citizens either a public highway or the waters of its rivers and seas. It has on the highway proper, and in the waters, governmental rights of regulation, control, and conservation. But beneath the surface of the highways held in fee by a government and beneath the waters of rivers and marginal sea belts lie subsoil and minerals which can be possessed, used, enjoyed, produced, and disposed of by the sovereign for profit—so long as its actions do not interfere with the public rights in the easements above. Minerals are produced from these subsoils by tunneling and slant drilling without disturbing public uses of the roads and waters. The right to take and enjoy the complete benefit of these subsoil minerals is *dominium* severable and distinct from the paramount *imperium*. The proprietary rights of *dominium* are merely limited by and subject to the governmental *imperium*, with which they must not interfere.

The marginal bed of the sea and beds of navigable waters furnish the best examples of the distinction between the original *imperium* and *dominium* of a sovereign. Even when the rights obtain concurrently, the *imperium* is paramount for the protection of public interests. In the common law the king was said to have a *jus publicum* in navigable waters for the protection of the public rights and interests and a *jus privatum*, which was his own private proprietary right to the resources of the bed and subsoil.

<sup>1</sup> Pound, *An Introduction to the Philosophy of Law*, 198-199 (1922). Reference was made to these pages by Mr. Chief Justice Vinson in a case involving South Carolina's rights over free-swimming fish in the waters of the marginal sea of that State. *Toomer v. Witsell*, 334 U.S. 385, 402 (1948). When the Court in that case said that "ownership" as applied to free-swimming fish is only a fiction expressive of "the power to preserve and regulate the exploitation of an important resource," it drew the distinction applicable here. Had the Court been referring to the right of the State or of the United States to take or make beneficial use of the subsoil minerals for profit, or even a right of exclusive disposition of the fish for profit, "ownership" would have been a correct descriptive term. Taking, using, and disposing for profit involves more than conservation and regulation. The former is *dominium* and the latter, *imperium*.

This rule was recognized by the Supreme Court of the United States in *Shively v. Bowlby*, 152 U.S. 1, 13 (1894):

“In England, from the time of Lord Hale, it has been treated as settled *that the title in the soil of the sea, or of arms of the sea, below ordinary highwater mark, is in the King*, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage; (citing cases) and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing.” (Emphasis supplied.)

The king's *jus privatum* in the bed and subsoil is distinguishable from the *jus publicum* which was an attribute of sovereignty. The former is *dominium*, the latter *imperium*. The two are not concurrent and inseparable. Thus in *Gammell v. Commissioners of Woods and Forests*, 3 Macq. (Scotland) 419 (1859), decision of the Court of Session affirmed by House of Lords of Great Britain, it was held that the right of the crown in the marginal seas around the seacoast of Scotland “is not to be regarded simply as an attribute of sovereignty, but rather as a *patrimonium*, a beneficial interest constituting part of the regal hereditary property.” Hence it was said that the crown could grant estates in it—in particular parts of it. Note here that the crown cannot alienate its sovereignty but can alienate its patrimony, i. e., its property, that in which it has *dominium*. *Id.* at 458 ff. Such alienations by grant are cited with reference to the records in *Duchess of Sutherland v. Watson*, 6 Session Cases (Scotland)

199, 203 (1868). The sovereign cannot give up its *imperium* and remain sovereign.

Common-law lawyers and civilians have been agreed as to the nature of the right of the crown with respect to the bed and subsoil of the marginal sea. Lord Cranworth said of the proposition that the crown had a property right as well as *imperium*: "Nobody doubts that such a right exists." *Gammell v. Commissioners of Woods and Forests*, 3 Macq. 419, 465 (1859). Erskine pointed out that as a consequence of *dominium* in the crown "treasures brought up from the bottom of these [i. e., the marginal] seas belong to the crown." Erskine, *Principles of the Law of Scotland*, ii, 1, 6 (1754).

In *Lord Advocate v. Trustees of Clyde Navigation*, 19 Session Cases 174 (1891), in the opinion of the Lord Ordinary (affirmed by the whole court on appeal) it is said:

"I am of opinion . . . that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is therefore to a large extent *extra commercium* [i. e., so far as it is accompanied by *imperium* the latter is not alienable]; but none the less is it, in my opinion, a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property.

"Such, I consider, is the result of all the best authorities—Scotch, English, and foreign.

"It is the doctrine of Craig, Stair, Erskine, and Bell—(Craig, i.13, p. 140; Stair, ii.1, 2; ii.1, 5; Ersk. ii.1, 6; ii.6, 13; Bell, 639). It is



the doctrine of Seldon and Hale, of Grotius and Vattel—(Grotius, ii.2, 13; Vattel, i.23, Puffendorf, iv.2, 6; . . .) and it has been affirmed on many occasions by high judicial authorities both in Scotland and England. It has also received practical effect in various judgments with respect *inter alia* to mineral under the sea. . . .” (Emphasis supplied.) *Id.* at 177.

These cases and the authorities they cite show that *dominium* as to the foreshore and as to the bed of the marginal sea is exactly the same and quite independent of *imperium* although they may co-exist. The *dominium* may be granted by the crown. The *imperium* cannot.

The distinction between rights in waters of the sea and the subsoil minerals is nowhere better demonstrated than in the Roman and Spanish law of the eighteenth and early part of the nineteenth centuries. During that time certain civil law countries, including Spain and Mexico, held to the doctrine that the foreshore and marginal sea was an unowned common. Yet, as to precious stones therein and as to mines and minerals thereunder, the sovereign's separate ownership applied the same as under all other lands within the realm. This point is developed fully in the State's brief. Suffice it to say here that the separate mineral ownership of the sovereign in Spanish and Mexican law, which later became the law of the Republic of Texas, was clearly severable from the public rights and governmental powers in the marginal sea. It was a *dominium* which could pass from the sovereign to an individual or another State only by specific grant or cession, neither of which was made by Texas to the United States upon admission to the Union. In addition to the separate

mineral ownership under its adopted Spanish-Mexican law, Texas adopted the common law as to ownership of the bed and subsoil of the marginal sea within its boundaries in 1840.

Thus as an independent nation the Republic of Texas owned the bed and subsoil and a separate estate in the minerals in that portion of the Gulf of Mexico within its boundaries. It had *dominium* of this property as well as the *imperium* of a sovereign nation. The two rights were severable. Its national sovereignty and all governmental powers attached thereto could be transferred with or without its minerals and subsoil ownership. One must look to the treaty or agreement by which it transferred its national sovereignty to determine whether there was also a cession of property rights.

Herein lies the vital distinction between the *Texas* case and that of *United States v. California*, 332 U.S. 19 (1947).

California never was an independent sovereignty with both *imperium* over and *dominium* in a public domain! It had no public domain of its own. The United States succeeded to both *imperium* and *dominium* with respect to the whole domain of California.

*Pollard v. Hagan*, 3 How. 212 (1845), is likewise to be distinguished. It held that by the Florida treaty the United States did not succeed to those rights in Florida which the King of Spain had held by virtue of his royal prerogative, but acquired and possessed the territory subject to the institutions and laws of its own government. Florida was never an independent sovereign. Alabama was acquired by cession from Virginia, Georgia, and France, subject

to trusts created by the cessions. The United States holds public lands in the States formed from territory derived from these cessions by virtue of the cessions, and the Constitutional power of Congress as to the territory and other property of the United States. Accordingly, those States have *imperium* for all but federal purposes over the whole domain within their boundaries including the foreshore. As to *dominium*, where the United States acquired it by cession, it is independent of the *imperium*.

Also *Shively v. Bowlby*, 152 U.S. 1 (1894) is to be distinguished. The title of the United States to Oregon is based on discovery. So the United States had from the beginning the public domain; it had both *imperium* and *dominium*. Oregon had and has only what the United States by its constitution and laws conferred on that State. It had no independent public domain of its own. In *United States v. California* the Court holds that it will not apply what was held in these cases as to the effect of admission to the Union on an equality with the original thirteen States beyond inland waters.

Texas is in a wholly different position since the *dominium* of the Republic of Texas to the full extent of the public domain was recognized and reserved, and it extended to the *dominium* of that Republic over the bed and subsoil of coastal no less than of inland waters and hence to the minerals beneath the bed of the marginal belt of the sea within the boundaries of the Texas Republic.

The subsoil below the bed of the marginal sea adjacent to the coast of Texas and within its boundaries was part of the public domain of Texas. It was claimed by the Republic of Texas after es-

establishing its independence and has been claimed and possessed by Texas ever since. Even if Lauterpacht's doctrine of acquisition of *dominium* over what is beneath the bed of the open sea by occupancy is adopted, the Republic of Texas so acquired it. Bringing the area within its fixed boundaries with possession maintained from shore and by its navy, exclusive use of the *fundum* and *maritima incrementa* gave the Republic constructive as well as actual occupancy.

In *United States v. California* the Court found that the original thirteen States did not separately acquire the lands beneath their marginal belts before the Union was formed. The Court said "any acquisition, as it were, of the three-mile belt [has] been accomplished by the National Government," and no transfer of proprietary rights had been made to those States or to California.

Quite differently from what the Court found with reference to the original States, the Republic of Texas did acquire its three-league marginal belt before it entered the Union. It did so in the same manner as the United States was held to have acquired the marginal belt off the shores of the original States—by extending national dominion thereover. In addition, Texas established and maintained fixed boundaries and brought the area within and subject to a body of domestic law which fixed ownership of the bed, subsoil, and minerals in the Republic.

At annexation Texas transferred only governmental powers, *imperium*, over its territory for federal purposes as granted by the Constitution. The United States acquired no *dominium* over lands in Texas except as acquired by cession or condemnation subsequent to annexation.



Texas' ownership cannot be exercised in such manner as to interfere with any federal governmental power which exists over the area. To that extent it is a limited and restricted ownership. The federal powers in national defense, commerce, and international relations are paramount. As said in the *California* case, they transcend the rights of a mere property owner. But they do not extinguish the rights of the property owner. They limit and restrict the owner's enjoyment only when necessary in the exercise of the transcending governmental powers. As on the Great Lakes, which have been held to be "open seas"<sup>2</sup> and beneath which far greater areas of submerged lands have been held to be owned by the States,<sup>3</sup> the United States may regulate navigation, make international agreements, and conduct the public defense, without owning the lands.

Wisely, the plaintiff does not contend that ownership of these lands and minerals is an inseparable attribute of external sovereignty. In this day when world governments are being planned it is important that *dominium* is not confused with or inextricably tied to *imperium*. Imagine a day when the governments of the world might join in an effective union. Assume that all of this nation's powers of external sovereignty, international relations, and defense were transferred to a United Nations of the World. This transfer of external sovereignty should not be held to carry with it any proprietary rights theretofore acquired by the United States in the marginal belt of the original States and California in the absence of a cession of the property.

<sup>2</sup> United States v. Rodgers, 150 U. S. 249 (1893).

<sup>3</sup> Illinois Central Railroad Co. v. Illinois, 146 U. S. 387 (1892).

Such is the situation which existed between Texas and the United States in 1845. Texas transferred its external sovereignty and certain enumerated properties which then pertained to its national defense. It ceded no other property. This is confirmed by a specific reservation of all "vacant and unappropriated lands lying within its limits." The subsoil and minerals remained in the State just as the subsoil and minerals of the California belt would remain in the United States if it should transfer external sovereignty to a larger federation of States without ceding its rights of a proprietary nature beneath the marginal sea of California.

The rights are separable and it was wholly within the power of the Congress of the United States to make the agreement allowing Texas to retain its marginal sea lands and minerals at the time national sovereignty was transferred. This is confirmed by a reference in the *California* decision concerning the power of Congress to prevent the Attorney General from bringing the California suit. There the Court said:

"For Article IV, § 3, Cl. 2 of the Constitution vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' We have said that the constitutional power of Congress in this respect is without limitation. *United States v. San Francisco*, 310 U.S. 16, 29-30. Thus neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power."

## MEMORANDUM ON UNITED STATES v. TEXAS

### Inapplicability of the California Case, 332 U. S. 19.

BY CHARLES CHENEY HYDE\*

The *California* decision was based upon a conclusion of the Court that the thirteen original States did not in fact own their marginal belts below low water mark, whatever those belts might embrace. It is unnecessary here to question the soundness of that conclusion. Texas simply asserts that it did in fact as an independent country acquire and gain title to the minerals and submerged lands within its territorial limits, and that the title to those lands has not been transferred to the United States.

The Supreme Court of the United States was not confronted with such a factual situation in the *California* case. In that case the Court did not in fact undertake to pass upon the meaning or interpretation of a title acquired by any political entity or State of the Union prior to its entering the Union to underlying lands of the marginal belt. In the present case, the outstanding factor is the definite assertion of title by Texas to lands underlying the sea over the area which it claimed to be its own, embracing an extent of three marine leagues from low water mark.

The evidence of that assertion within those limits is clear. The claim does not necessarily involve any

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right to the water or use of the water superjacent to the soil.

Texas had made it clear that within the territorial limits referred to, it was a sovereign State asserting in an international sense exclusive control of areas therein, and embracing also ownership over all lands and rivers of every kind within the same limits. These assertions were apparent in the Texan statutory law during the period of its independence, also in the terms on which it was admitted to statehood in the United States, and in the provisions in certain subsequent treaties.

Let us take a look at the assertions of Texas with respect both to the extent of the territorial areas involved, and to the relation to itself of the area claimed.

On December 19, 1836, Texas enacted a law, announcing that its boundary beginning with the mouth of the Sabine River ran "west along the Gulf of Mexico three marine leagues from land, to the mouth of the Rio Grande"; and it maintained throughout its life as an independent nation its dominion over this area. The territory "properly included within, and rightfully belonging to the Republic of Texas,"<sup>2</sup> was admitted into the Union and became the new State of Texas by two joint resolutions of the federal Congress coupled with one joint resolution by the Congress of the Republic of Texas. To

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<sup>1</sup> Act of December 19, 1836. John and Henry Sayles, *Early Laws of Texas*, vol. 1, art. 257.

<sup>2</sup> S. A. Risenfeld, *Protection of Coastal Fisheries under International Law*, Washington, 1942, p. 259, citing Joint Resolution of Congress of March 1, 1845, 5 U. S. Stats. 797, and Act of December 29, 1845, 9 U. S. Stats. 108.



quote a careful observer, "it would seem to follow from the three joint resolutions mentioned above that the gulf boundary of Texas runs at a distance of three leagues from the Gulf coast."<sup>3</sup> Again it is not without significance that the Government of the United States, doubtless influenced by the territorial extent of the Texan territory, utilized the same in its treaty of Guadalupe Hidalgo concluded with Mexico, February 2, 1848,<sup>4</sup> and in the Gadsden Treaty with Mexico concluded December 30, 1853.<sup>5</sup>

The action of Texas when as an independent nation it fixed its seaward boundary at three marine leagues, although not duplicated by similar action on the part of the thirteen original States of the United States in their colonial days, was not contrary to international law, where there was and remains lack of unanimity concerning what should constitute the sea limits of a territorial sovereign. What stands out is the existing lack of general agreement among interested States concerning an exact geographical test of limits. This was apparant at the Hague Conference of 1930.<sup>6</sup> It certainly could not be maintained that the three marine league test was arbitrary at the time when the State of Texas made use of it, or an extension of what the law of nations was acknowledged to permit. There is abundant evidence expressed both by commentators and statesmen that States generally enjoyed great latitude in

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<sup>3</sup> S. A. Riesenfeld, *op. cit.* at 259.

<sup>4</sup> Art. V, U. S. Treaty Vol. 1, 1109.

<sup>5</sup> U. S. Treaty Vol. I, 1122.

<sup>6</sup> See Hyde, *International Law*, 2d ed., § 141, and documents there cited.

fixing their seaward limits, and that, within those limits they felt free to regard subjacent land as their own, and, among other things to deal with it as property.<sup>7</sup> Internationally, as between State and State, questions did not arise concerning issues between a particular country and a constituent part thereof such as a colony or a province; for that was essentially a domestic question. What mattered was merely the nature and extent of the claim of the territorial sovereign as such in opposition to the claim of an essentially foreign country.

Now what was the precise character of the assertion which the Republic of Texas made with respect to that part of its domain which constituted the soil underlying the waters claimed to be within its territorial limits? The question obviously has nothing to do with the matter of territorial limits, except in an indirect sense. The answer is to be found in the simple examination of facts that record the doings of the State. They shed decisive light. They reveal the fact that Texas did two distinctly different things. First, Texas asserted political control or sovereignty over the area concerned; secondly, Texas definitely asserted also a property right as such over all of the territory concerned. This latter assertion was partly due to the prevalence of the Spanish law which Texas inherited and which enabled it automatically to acquire and possess itself of rights of

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<sup>7</sup> See "Summary of Available Opinions of Jurists and Publicists—1670-1950, On Question of Submerged Lands of Territorial Marginal Sea Being Subject to Ownership," in the Appendix of Texas' brief.

property in areas belonging to itself.<sup>8</sup> The documents of the time reveal distinctly how Texas affirmatively clung to and possessed itself of rights of ownership within its domain. This fact has great significance in the examination of much that follows; for it is productive of the simple question whether Texas ever did by any appropriate process through treaty or otherwise surrender to the United States property owned by the former in lands constituting the seabed within its territorial limits.

It is believed to be reasonable to declare that when Texas entered the Union, it surrendered only its governmental powers of national sovereignty—not its lands or rights of substance theretofore acquired by its own use of those powers. These rights of substance that Texas had acquired were distinct and therefore separable from the paramount governmental powers originally employed in making the acquisition. In a word, the Texan rights of substance did not pass to the United States by transfer of those governmental powers of national sovereignty. Again it should be noted that these rights of substance were not ceded to the United States by the annexation agreement. One searches in vain for a document indicating any general transfer.

Perhaps by way of repetition it needs to be emphasized that when the Supreme Court of the United States decided in the *California* case that "Cal-

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<sup>8</sup> The writer in his work, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. 1, Title B., §§ 98-217d, has used the term "General Rights of Property and Control" to embrace the full measure of the rights which a State may in law be said to possess with respect to any particular area.

ifornia is not the owner of the three-mile marginal belt along its coast" (332 U. S. at 38) it was not dealing with a situation where, as in that of Texas, a prior sovereign State had made definite claims to ownership as well as sovereignty, and where the final issue was and is whether there had been a transfer of those rights of ownership. This is really a question of treaty interpretation and unlike anything that the Supreme Court had before it in the *California* case. It is a question on which the Supreme Court has always afforded great latitude to disputing litigants for full development of the evidence as to the intention of the parties as well as to the customs and usages of nations on all related matters which throw light upon the disputed issues between them.

When Texas entered the Union it is fair to say that it only surrendered its governmental powers of national sovereignty—not its lands or rights of substance theretofore acquired by its own use of those powers.

From careful but unfinished studies in the pending case the writer is satisfied that Texas as an independent nation owned the bed and subsoil minerals underlying the Gulf of Mexico and within its three-league boundary. Accordingly, he intensely regrets that he has not further opportunity, through lack of time, to set forth at length the reasons for this conclusion. C.C.H. 3/14/50.



## SUMMARY OF AVAILABLE OPINIONS OF JURISTS AND PUBLICISTS — 1670-1950\*

*On Question of Submerged Lands of Territorial Marginal Sea Being Subject to Ownership as Well as Sovereignty*

Year	Authority	Recognizes Both Ownership and Sovereignty	References and Quotations	
			Sovereignty	Ownership
1670	HALE, Matthew. Lord Chief Justice of England. <i>De Jure Maris</i> (in Hargrave's <i>Law Tracts</i> , Dublin, 1787).	Yes	"The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not." (p. 10.)	"In this sea the king of England hath a double right, viz. a right of jurisdiction . . . and a right of property or ownership." (p. 10.) "And besides, the soil itself under the water is actually the king's." (p. 18.)
1676	MOLLOY, Charles. English legal writer. <i>De Jure Maritimo et Navali</i> , Bk. I. (Extract from 8th edition in Crocker, <i>The Extent of the Marginal Sea</i> , Washington, 1919; pp. 297-298.)	Yes	"After the writings of the illustrious Selden, certainly 'tis impossible to find any prince or republic or single person imbued with reason or sense that doubts the dominion of the British Sea to be entirely subject to that imperial diadem." (pp. 297-298.)	"And as the sea is capable of protection and government, so is the same no less than the land subject to be divided amongst men, and appropriated to cities and potentates, which long since was ordained of God as a thing most natural." (p. 298.)
1688	PUFENDORF, Samuel. German writer. <i>De Jure Naturae et Gentium</i> (17 <i>Classics of International Law</i> , Vol. II, Oxford, 1934; tr. by C. H. and W. A. Oldfather).	Yes	" . . . I should feel that it involves no absurdity to say that parts of the sea, in so far as they serve as a defence, and so as a part of the State, have begun to pass without any special corporal act under the dominion of that people whose shores they wash, as soon as nations learned the use of warships." (p. 564.)	"For upon this consideration the sea becomes a portion, as it were, of the land, like trenches, or even as the adjoining marshes and swamps are held to be a part of a city. . . . Just as in the occupancy of immobile objects there is no deed to touch each part with the body, but when one part has been touched, that act is understood to bring the entire thing of which it is a part under the right of ownership." (pp. 564-565.)

\*Beginning date of 1670 selected because of accord of authorities since that date on "freedom of seas" and on a distinction between "high seas" and the adjacent marginal belt included within territory of littoral State.

1702	van BYNKERSHOEK, Cornelius. Dutch jurist. <i>De Dominio Maris</i> . (Extract from Magoffin's translation of 1844 edition, in Crocker, pp. 14-15.)	Yes	"... The possession of a maritime belt ought to be regarded as extending just as far as it can be held in subjection to the mainland; for in that way, although it is not navigated perpetually, still the possession acquired by law is properly defended and maintained." (p. 14.)	"Hence we do not concede ownership of a maritime belt any farther out than it can be ruled from the land, and yet we do concede it that far; for there can be no reason for saying that the sea which is under some one man's command and control is any less his than a ditch in his territory." (p. 14.)
1750	MOSER, Johann Jacob. German publicist. <i>Grund-Sätze des jetzt-üblichen Europäischen Völkerrechts in Friedens-Zeiten</i> . Hanau. (Translated from original edition.)	Yes	"The existing principles of the European law of nations, however, might be the following: [1] Seas or gulfs, which are included in the states of a sovereign, are without dispute under the overlordship of that sovereign. [2] The sea on the coasts, as far as can be swept by cannon, also." (p. 345.)	
1750	SURLAND, Johann Julius. German publicist. <i>Grund-Sätze des Europäischen See-Rechts</i> . Hanover. (Translated from original edition.)	Yes	"The jurisdiction [ <i>Gebiete</i> ] over harbors, shores, coasts, and banks extends as far as the water washing thereon can be contested with cannon." (§ 483.)	"A part of the sea can be taken into possession, and accordingly dominion may be had over it." (§ 564.)
1758	de VATTEL, Emmeric. Swiss jurist and publicist. <i>Le droit des gens</i> , Bk. I. (Translation of 1797 used in Chitty's first edition, London, 1834.) The most widely cited international law authority in America during 18th and 19th centuries.	Yes	"These parts of the sea, thus subject to a nation, are comprehended in her territory." (§ 288.) "... The dominion of the state over the neighbouring sea extends as far as her safety renders it necessary and her power is able to assert it." (§ 289.) "These parts of the sea are within the jurisdiction of the nation, and a part of its territory." (§ 295.)	"The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc." (§ 287.) "When a nation takes possession of certain parts of the sea, it takes possession of the empire over them, as well as of the domain, on the same principle which we advanced in treating of the land." (§ 295.)
1759	HUBNER, Martin. Danish diplomat. <i>De la saisie des bâtimens neutres</i> . The Hague. (Translated from original edition.)	Yes	"... it is evident that these parts of the sea [which wash on the coasts] belong, as an accessory, to the master of this country." (Vol. I, p. 57.)	

Year	Authority	Recognizes Both Ownership and Sovereignty	References and Quotations	
			Sovereignty	Ownership
1760	VALIN, René. Josué. French publicist. <i>Nouveau Commentaire sur l'Ordonnance de la Marine du Mois d'Août</i> , La Rochelle. (Translated from original edition.)	Yes	"Up to the distance of two leagues, then, and with that qualification [right of innocent passage in the ordinary course of navigation], the sea is in the domain of the sovereign of the neighboring coast, and that whether one can fetch bottom with the lead or not. . . . But that does not prevent the sea domain, as to jurisdiction and fishing, being capable of extension further, whether by virtue of treaties of navigation and commerce, or by the rule established above." (p. 640.)	
1776-1778	LAMPREDI, Giovanni Maria. Italian publicist. <i>Juris Publici Universalis sive Juris Naturae et Gentium Theoremata</i> , 2nd Italian ed. by Cacchi, Milan, 1828. (Translated from 1828 edition.)	Yes	"Therefore it cannot be doubted that these parts of the sea can be subjected to dominion and to empirium, for the sake both of utility and of security." (p. 180.)	"In the same way that the portion of the sea near to the shore may be occupied by the people to whose public dominium the territory adjacent to the sea is subject, nothing prevents a part of the sea, occupied to the extent of the advantages which it can yield, being able to fall under the ownership [ <i>dominio</i> ] of a private individual, if the public authority consents to it." (p. 183.)
1780	TOZE, Eobald. Dutch publicist. <i>La liberté de la navigation et du commerce des nations neutres pendant la guerre</i> , London and Amsterdam. (Translated from original edition.)	Yes	". . . States contiguous to the sea . . . are masters of the shore and the sea which surrounds it as far as they can defend their ownership [ <i>propriété</i> ] of it from the land." (p. 23.)	
1782	GALIANI, Ferdinando, Italian statesman and writer. <i>Dei Doveri dei Principi Neutrali</i> . (Translated from 2nd edition, Bologna, 1942.)	Yes	"Finally, it is well established that that edge of the open sea which washes the shore of the land belongs to and is regarded as incorporated with the territory, and forms a part of it." (p. 321.)	



1787-1792	GUNTHER, Karl Gottlob. German publicist. <i>Europäisches Völkerrecht in Friedenszeiten</i> . Altenburg. (Translated from original edition.)	Yes	"Within ownership and jurisdiction is (1) the entire sea on the coast of each nation, so far as it can be swept by cannon. . . ." (Vol. 2, p. 53.)	
1789	von MARTENS, Georg Friedrich. German jurist and publicist. <i>Précis du droit des gens moderne de l'Europe</i> , English translation by William Cobbett, London, 1802. Cobbett's translation of 1795, dedicated to President Washington, was subscribed to by all members of Congress.	Yes	"In order the better to understand the rights of nations on the seas and waters in general, it is essential to distinguish property from empire. The first implies a right to enjoy a thing exclusively, and even to dispose of it; the second, a right to demand obedience, respect, and honour, from those who make use of it." (pp. 159-160.)	"The sea surrounding the coast, as well as those parts of it which are land-locked, such as the roads, little bays, gulphs, &c. as those which are situated within cannon shot of the shore (that is, within the distance of three leagues), are so entirely the property, and subject to the dominion, of the master of the coast, that . . ." (p. 168.)
1802	NAU, B. G. German writer. <i>Grundsätze des Völkerseerechts</i> , Hamburg. (Translated from original edition.)	Yes	" . . . If, however, the coasts form a part of the land which belongs to the possessions of a people, the necessary security of the state demands the removal of the common use of these shores, and along with the dominion of the shores for their security it demands that the state assert ownership also over an additional part of the sea territory." (p. 101.)	
1803	BOUCHER, Pierre B. French juriconsult. <i>Institution du droit maritime</i> , Paris. (Translated from original edition.)	Yes	"I call territorial sea that part of the sea which borders on the coasts of a State." (p. 46.)	" . . . The sea which washes the coast of a State is property, or a continuation of its territorial property." (p. 46.)
1803	RAYNEVAL, Joseph Mathias Gerard de. French publicist. <i>Institutions du droit de la nature et des gens</i> , Paris. (Translated from original edition.)	Yes	"The sea which washes the coasts of a State is considered to be a part of it; . . . the sea must serve her as a rampart." (p. 161.)	"We might add that the bottom of the sea, along the coasts, can be considered as having been part of the continent, and that it is therefore considered as still forming part of it. But the extent of this ownership is not determined by a uniform rule: some carry it out to thirty leagues, others only to three; others fix it at the range of cannon placed on the seashore. Along the southern coast of France, the distance was ten leagues as to the Barbary States." (p. 161.)



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1805	AZUNI, M. D. A. Italian juriconsult. <i>Droit maritime de l'Europe</i> , Vol. I; English translation by William Johnson, New York, 1806.	Yes	"In the first ages of the world, the sea adjacent to the coast, belonged to the first occupier of the main land, as well on account of its utility for fishing and transportation, as because it was considered as an appendage, or rather, an accession to it." (p. 182.) "The right of sovereignty along the seashore flows from the territorial domain." (p. 186.)	"It follows from this fundamental principle, that the empire of the sea, according to the system established in the preceding chapter, is not to be regarded as a vain jurisdictional right . . . but has the real effects of every other kind of property. It differs in nothing from that of the land." (p. 224.)
1806	JOUFFROY, Henri. Prussian diplomat. <i>Le droit des gens maritime universel</i> , Berlin. (Translated from original edition.)	Yes	"The imperium [ <i>empire</i> ] over territorial seas, in the extent commonly given to it, is not a vain prerogative, an honorific right, but is of such a nature that it has the results of any other territorial property." (p. 27.)	"Ownership of these [territorial seas] belongs incontestably to the nation, since it can occupy them and defend them either by vessels stationed off the coast or batteries mounted on it; and since it may cause works to be carried out in these seas to make the approaches and use safe and convenient, by putting up signal lights or marking shallow depths and surface rocks by buoys." (p. 23.)
1811	SCHULTES, Henry. English publicist. <i>Essay on Aquatic Rights</i> , London.	Yes	"By the common-law, the king hath the sovereign dominion over the sea adjoining the coasts, and over the navigable rivers; and hath also the right of property in the soil thereof, and is consequently entitled to all <i>maritima incrementa</i> ." (p. 109.)	
1817	SCHMALTZ, Theodore Anton Heinrich. German publicist. <i>Das Europäische Völker-Recht</i> , Berlin. (Translated from original edition.)	Yes	"But there are parts of the sea over which the dominion of a state is recognized by all nations, even when they are not so surrounded by land that this supremacy might seem to be a natural consequence." (p. 140.)	"Moreover, the sea along the coasts has always been regarded as the property of that country. . . . It is said that the sea must belong to the land as far as it can be defended from land, and that this extends as far as a shot from a cannon on the shore may reach; but this has since been fixed rather arbitrarily at three leagues." (p. 141.)

1818	SCHMELZING, Julius. German publicist. <i>Systematischer Grundriss des praktischen Europäischen Völker-Rechtes</i> , Rudolfstadt. (Translated from original edition.)	Yes	"It has become a general rule of the courts [ <i>Grundsatz der Höfe</i> ] that the part of the sea bordering on the shore is considered to belong to the land, as far, that is, as it can be contested from the land." (Vol. 2, p. 12.)
1819	KLUBER, Johann Ludwig. German publicist. <i>Droit des gens moderne de l'Europe</i> , Stuttgart. (Translated from original edition.)	Yes	"To the <i>maritime territory</i> of a state belong the maritime districts or areas susceptible of exclusive possession, over which the state has acquired (by occupation or convention) and maintained sovereignty. In this category are (1) the parts of the ocean which border on the mainland territory of the state. . . ." (p. 199.)
1821	HOLROYD, J., in <i>Blundell v. Catterall</i> , 5 B. & Ald. 268, 106 Eng. Rep. 1190 (King's Bench).	Yes	"By the common law . . . the soil betwixt the ordinary flux and reflux of the tide, as well as the [territorial] sea itself, belongs to the King." (p. 1201.) "An appropriation by any of the King's subjects, without his grant or license, . . . would be . . . an intrusion upon the King's soil." (p. 1201.)
1826	ANGELL, Joseph Kinnicut. American writer. <i>A Treatise on the Right of Property in Tide Waters, and in the Soil and Shores Thereof</i> , Boston.	Yes	"To the king, therefore, is not only assigned the sovereign dominion over the sea adjoining the coasts, and over the arms of the sea; but in him is also vested the <i>right of property</i> in the <i>soil thereof</i> ." (p. 18.)
1829	LORD WYNFORD, in <i>Benest v. Pison</i> , 1 Knapp 60, 12 Eng. Rep. 243 (Privy Council).	Yes	"The laws of England and Jersey [are] precisely the same with regard to land that is below ordinary tides, dealing with such land as a part of the bottom of the sea, and vesting the original right to it in the King." (p. 247.) "The sea is the property of the King, and so is the land beneath it, except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the King, or has exclusively used for so long a time as to confer on him a title by prescription." (p. 246.)
1830	HALL, Roebt Gream. English writer. <i>An Essay on the Rights of the Crown and the Privileges of the Subject in the Sea-shores of the Realm</i> , London.	Yes	"The title of the King of England to the land or soil <i>aqua maris cooperta</i> , is similar to his ancient title to all the <i>terra firma</i> in his dominions, as the first and original proprietor and lord paramount." (p. 4.) "This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction; but it includes the very <i>fundum</i> or soil at the bottom of the sea." (p. 2.)

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1830	WOQLRYCH, Humphrey William. English writer. <i>A Treatise on the Law of Waters and of Sewers, Including the Law Relating to Rights in the Sea</i> , London.	Yes	"It is agreed, that as the king has the sovereign dominion over the sea adjoining to the coasts, and over the navigable rivers, he has also a right of property in the soil. And thus it is, that he becomes entitled to maritime accessions, or, as they are called, <i>incrementa</i> , save and except fish other than royal fish." (p. 19.)	
1832	BELLO, Andrés. Venezuelan diplomat and professor of international law. <i>Principios de Derecho de Jentes</i> , Santiago de Chile (Translated from original edition.)	Yes	"Regarding the sea, there is a generally admitted rule: each nation has the right to consider as pertaining to its territory and subject to its jurisdiction the sea which washes its coasts out to a certain distance." (p. 31.)	
1833	SAALFELD, Jakob Christoph Friedrich. German writer. <i>Handbuch des positiven Völkerrechts</i> , Tübingen. (Translated from original edition.)	Yes	"The right of every nation is generally recognized to appropriate to itself so much of the open sea which does not go into the land, as it can control." (p. 93.)	"... The shore and the part of the sea which washes it are the property [ <i>eigenthum</i> ] of the state." (p. 93.)
1836	WHEATON, Henry. American lawyer, diplomat and publicist. <i>Elements of International Law</i> , Philadelphia.	Yes	"The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the state." (p. 142.)	"Within these limits, its rights of property and territorial jurisdiction are absolute and exclude those of every other nation." (pp. 142-3.)
1840	LUCCHESI-PALLI, Ferdinando. Italian publicist. <i>Principii di diritto pubblico maritimo</i> ; French translation, <i>Principes du droit public maritime</i> , Paris, 1842. (Translated from French edition.)	Yes	"The portion of the sea which washes on the coasts off which fishery of pearls, amber, coral, etc., takes place, is susceptible of appropriation. In fact, these objects which are sought there are not inexhaustible, and it is just that the nearby inhabitants of these coasts should appropriate them and acquire absolute possession of them, as they do with the land they live on." (p. 4.)	



1844	HEFFTER, A. W. German jurist and writer. <i>Das Europäische Völkerrecht der Gegenwart</i> , Berlin. (Translated from original edition.)	Yes.	"It is admitted by most that the national property . . . extends . . . (c) over the whole coastal sea, as far as can be kept in exclusive possession, either from the coast or by the ever present naval power and defense works ( <i>quousque mari e' terro imperari potest</i> ); concerning this, it seems there is a general agreement among the nations in principle, even though the extent of the maritime frontier is not in complete accord by all." (p. 131.)
1844	MASSE, Gabriel. French lawyer. <i>Le droit commercial dans ses rapports avec le droit des gens</i> , Paris. (Translated from original edition.)	Yes	"Each nation has therefore a right of police and jurisdiction over the part of the sea which borders on its coasts and forms in some sort a part of its territory." (Vol. 1, p. 111.)
			"The sea which borders on the coasts can be considered, up to a certain distance, as their natural rampart, consequently as accessory to them, and in this respect it belongs to the sovereign of the land it limits." (Vol. 1, p. 111.)
1845	SALA, Juan. Mexican publicist. <i>Sala Mexicano, o sea La Ilustración al Derecho Real de España</i> , Mexico. (Translated from original edition.)	Yes	"The various uses made of the sea near the coasts make it susceptible of ownership as to that portion adjacent to the land. . . . This use of the sea coupled with the faculty they [nations] have to prohibit other nations from so doing, has converted the sea as to this portion thereof into property no different than the lands occupied by them." (Vol. 2, p. 11.)
1846	LORD COCKBURN, in <i>Officers of State v. Smith</i> , 8 Sess. Cas. 711 (Court of Session of Scotland), aff'd, <i>Smith v. Earl of Stair</i> , 6 Bell's App. Cas. 487 (House of Lords).	Yes	"I know of nothing which I think might be predicated with greater safety or that less requires formal proof, than that the bed of the British seas belongs in property to the British Crown." (p. 723.)
1848	HAUTEFEUILLE, Laurent Basile. French jurist. <i>Des droits et des devoirs des nations neutres en temps de guerre maritime</i> , Paris. (Translated from original edition.)	Yes	"Territorial seas . . . are under the sovereignty of the nation who is mistress of the coast washed by them; they are under her dominion in the same manner and by the same title as the land." (p. 231.)
			" . . . According to primary law, the territorial sea can be brought under the sovereign domain, and . . . it is the property of the riparian nation." (p. 231.) "There is continuous, complete, and absolute possession, as there might be of a river, a lake, or a piece of land territory." (p. 232.)



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1849	RIQUELME, Antonio. Spanish diplomat and publicist. <i>Elementos de Derecho Publico Internacional</i> , Madrid. (Translated from original edition.)	Yes	"The rule recognized by the law of nations for determining the legal status of the littoral seas is based on the idea that all is lawful for the lord of the coasts which his own preservation demands and which can not prevent innocent use by others." (Vol. 1, p. 209.)	"... The right of property may be exercised over ports and littoral seas. . . . By the term 'territory' belonging to a state is understood not only its land territory, but also its rivers and interior seas, its lakes, ports and littoral seas." (Vol. 1, p. 23.)
1853	ORTOLAN, Jean Félicité Théodore. French naval officer and writer. <i>Règles internationales de diplomatie de la mer</i> , 2nd ed., Vol. I. (Excerpts from translation in Crocker, pp. 347-352.)	No	"... the general custom of nations in accordance with public treaties, permits imaginary lines to be traced along the coast at a suitable distance following its sinuosities, which may be considered as the artificial maritime boundary. Every ship which finds itself inside of this line is said to be in the waters of the State whose right of sovereignty and jurisdiction it limits." (p. 349.)	"The obstacle of universal reason always exists; thus the right over the territorial sea is not one of property." (p. 350.) (Author writes only of waters, not of bed or sub-soil.)
1853	POLSON, Archer. English writer. <i>Principles of the Law of Nations</i> , London.	Yes	"So much of the sea as is included within the territories of a State . . . is considered as belonging to that State." (p. 34.)	
1854	BARON ALDERSON, in <i>Attorney-General v. Chambers</i> , 4 De G. M. & G. 206, 43 Eng. Rep. 486 (Chancery).	Yes	"The Crown is clearly in such a case, according to all the authorities, entitled to the ' <i>littus maris</i> ' as well as to the soil of the sea itself adjoining the coasts [sic] of England." (p. 489.) The case involved title to coal veins extending under the sea.	

1854 PHILLIMORE, Robert J. English jurist. <i>Commentaries upon International Law</i> , Vol. 1, London.	Yes	"Though the open sea be thus incapable of being subject to the rights of property, or jurisdiction, yet reason, practice, and authority have firmly settled that a different rule is applicable to <i>certain portions</i> of the sea. And first with respect to that portion of the sea which washes the coast of an independent State." (p. 210.)	"Besides the rights of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may, under special circumstances, be prescribed for. . . ." (p. 212.)
1856 CUSSY, Ferdinand Baron de. French publicist. <i>Phases et causes célèbres du droit maritime des nations</i> . Vol. I. (Excerpts from translation in Crocker, pp. 48-53.)	Yes	"But the protection of the territory of a nation and its shore fishing, which is the chief resource of the inhabitants of the coast region shows the necessity of recognizing a <i>maritime territory</i> , or, better still, a territorial sea, for all coast States—that is, some definite distance from the coast <i>considered as a continuation of the territory</i> , and over which the special sovereignty of each maritime nation might extend." (p. 48.)	"Although the extent of the property or sovereignty over the territorial sea still appears to present some uncertainty, it does not exist to the extent indicated by the observations of Rayneval." (p. 52.) (The uncertainty he mentions refers to the <i>extent</i> of the territorial sea.)
1859 LORD CHELMSEFORD, in <i>Gammell v. Commissioners of Woods and Forests</i> , 3 Macqueen's Appeal Cases 419 (House of Lords).	Yes	"It only remains to be considered whether this right [salmon-fishing around the seacoast] belongs to the crown merely as an attribute of its sovereignty, and as a trustee for the public, or whether it is to be regarded as a <i>patrimonium</i> , and therefore as a part of its hereditary revenues. I do not think that your lordships will entertain much doubt upon this point. . . . All the passages from the writers already quoted as to the effects of grants of salmon fishing, or of grants <i>cum piscationibus</i> , support the right of property in the Crown." (pp. 463-64.)	
1860 GARDNER, Daniel. American lawyer and writer. <i>Institutes of International Law</i> , New York.	Yes	"A nation's exclusive jurisdiction, by virtue of its sovereignty, extends over its maritime curtilage, if it be a maritime State." (p. 21.)	"Every nation and State, by virtue of sovereignty, is deemed the original owner of the soil of its territory, with its curtilage, if any, of the soil under great lakes, naturally and nationally navigable rivers, straits, bays, and under such curtilage." (p. 402.)

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1862	CAUCHY, Eugène. French publicist. <i>Le droit maritime international</i> . (Excerpts from translation in Crocker, pp. 41-44.)	Yes	"It can not be doubted by anybody that the portions of the sea adjoining the coast in a certain measure participate of the nature of the coasts themselves and may, in certain respects, fall within the useful domain of such State or people or in other respects depend upon its police." (p. 42.)	"If it is true that the mass of waters of which the open sea is composed, by its nature escapes occupation or domination, we must recognize that these same waters divided into stretches of small extent become susceptible of public, or even private property." (p. 41.)
1865	LORD WESTBURY, in <i>Gann v. The Free Fishers of Whitstable</i> , 11 House of Lords Cases 192.	Yes	The Court of Common Pleas, affirmed by the Exchequer Chamber, held that the soil of the marginal sea was vested in the Crown and could (before Magna Carta) be granted as a several fishery. The House of Lords agreed, but reversed the judgment on the ground that the Crown's ownership was subject to the public right of navigation, and that therefore no toll for anchorage could be charged.	
1866	OPPENHEIM, Heinrich Bernard, German publicist. <i>System des Völkerrechts</i> , 2nd ed., Stuttgart and Leipzig. (Excerpts from translation in Crocker, pp. 336-339.)		"The property of the State extends as far as the direct material influence, ' <i>corporalis detentio</i> '; or according to the old saying: ' <i>Terrae dominium finitur ubi finitur armorum vis</i> .'" (p. 336.)	
1866-1867	POMEROY, John Norton. American jurist and writer. <i>Lectures on International Law in Time of Peace</i> (1866-67), edited by Theodore S. Woolsey, Boston and New York, 1886.	Yes	"It has always been considered that the territorial rights of a nation whose land is washed by the ocean are not limited by high or low-water mark; but extend to some distance over the neighboring waters." (p. 176.)	"There are, as we have seen, exceptional parts of the sea where . . . possession, and, therefore, proprietorship and dominion, can be and are maintained. Such are ports, roads, straits, bays, gulfs, enclosed seas, and even the main ocean itself for a little distance from the shores." (p. 190.)



1868	BON, Antonio del. Italian publicist. <i>Istituzioni del Diritto Pubbico Internazionale</i> , Padua (Translated from original edition.)	Yes	Approves Sarp's statement that "any state has dominion [ <i>e padrone</i> ] over such part of the sea as it needs to have, without injury to the other states." (p. 83.) "The right of the subjects of a state to fish originates in property rights that the state has over its territorial sea." (p. 79.)
1868	LORD NEAVES, in <i>Duchess of Sutherland v. Watson</i> , 6 Sess. Cas. 199 (Court of Session of Scotland).	Yes	"... The <i>solum</i> or <i>fundus</i> of the deep sea—that is, not only the part between high-water and low-water mark, but the sea within such a line as may be reasonably drawn in connection with the shores—belongs in property to the Crown, and does so as a patrimonial right." (p. 213.)
1875	CARNAZZA-AMARI, Giuseppe. Italian publicist. <i>Trattato sul diritto internazionale pubblico di pace</i> , 2nd ed.; French translation, <i>Traité de droit international public en tempts de paix</i> , by Montanari-Revest, Paris, 1880-1882. (Excerpts from translation in Crocker, pp. 34-40.)	Yes	<p>"The possession of the territorial sea is possible because by erecting fortifications upon the shore the State can prevent access and guarantee the exercise of sovereignty. Consequently the adjacent seas, ports, gulfs, straits, bays, etc., are subject to the sovereignty of States and considered a part of their territory." (p. 36.)</p> <p>"Thus, we may admit the property of the State over the coast of the sea, over its beaches, and even over the fruits of the submarine soil." (but not over the water). (p. 38.)</p>
1876	CASANOVA, Ludovico. Italian publicist. <i>Del Diritto Internazionale Lezioni</i> , 3rd ed. by Emilio Brusa, Florence. (Translated from 3rd edition.)	Yes	<p>"All the treaties, without exception, when referring to commercial interests, recognize, on the part of the nations, a right of sovereignty over its territorial sea as if it were a part of its land territory." (p. 127.)</p> <p>"The reasons for the absence of rights of property or imperium over the sea are not present, absolutely in all its areas. There are certain parts near the land . . . where such reasons disappear." (p. 116.)</p>



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1876	LORD COCKBURN and LORD COLERIDGE, in <i>The Queen v. Keyn</i> , [1876] L. R., 2 Ex. Div. 63 (Court of Crown Cases Reserved).		This case does not cover ownership, and the majority view expressed by Lord Cockburn cast doubt upon both sovereignty and ownership of England over the marginal sea. The minority views expressed by Lord Coleridge and others upheld the theory of both sovereignty and ownership. It is the only common law case which questions either right, and it has been sharply criticized by many publicists and subsequent English cases. Parliament in 1878 passed a law asserting both sovereignty and ownership. John Bassett Moore said that Parliament "considered it imperative to adopt legislation nullifying the decision's effect for the future, besides declaring it wrong as to the past." (Moore's <i>Collected Papers</i> , Vol. 7, p. 294.)	
1876	CREASY, Edward S. English writer. <i>First Platform of International Law</i> , London.	No	"But the right of the State to exclusive jurisdiction over the adjacent sea within the range of cannon-shot applies only to purposes of defence, to the protection of the State's fisheries, revenues, and to secure its maintenance of neutrality." (p. 234.) (Refers only to waters, not to bed and subsoil.)	
1876	FIELD, David Dudley. American jurist. <i>Outlines of an International Code</i> , 2nd ed., New York and London.	Yes	"The territory of a nation is the land and water which it possesses, or has a present right to possess, as defined and limited by actual and peaceful occupation, by special compact, or by the provisions of this Code. Territory is here used in the sense of sovereignty and jurisdiction, and not in the sense of property." (p. 14.)	"The limits of national territory, bounded by the sea, extend to the distance of three marine leagues outward from the line of low-water mark." (p. 15.) "A nation is presumed to be the owner of all public, and all unappropriated, property within its territorial limits." (p. 21.)
1878	BLUNTSCHLI, J. D. German jurist. <i>Das Moderne Völkerrecht der Civilisirten Staaten</i> , 3rd ed., Nördlingen. (Translation from 3rd edition.)	Yes	"The following are subject to a restricted territorial sovereignty: a. The coastal margin that washes upon the land. . . . The close relation of such parts of the sea to the land and to the state justifies a relative extension of territorial sovereignty." (p. 185.)	"The same are regarded as an appurtenance of the land, the power and protection of which extend over it." (p. 185.)

1878	WOOLSEY, Theodore Dwight. American teacher of international law. <i>Introduction to the Study of International Law</i> , 5th ed. (Page references are to 6th ed. by T. S. Woolsey, New York, 1892.)		"The right to some kind and degree of jurisdiction over a belt of coast-sea is now admitted by writers on international law of all Christian nations, and appears in a number of treaties." (§ 57, p. 68.)	"An important question is, How much of what degree of right a state has over that part of the high sea which washes its shores. The answer must be that the right is a <i>limited</i> one." (§ 57, p. 69.) (He discusses superior rights of navigation but recognizes right to prohibit others from taking shell-fish, etc. § 59, p. 74.)
1879-1884	FIORE, Pasquale. Italian jurist. <i>Treatato di diritto internazionale pubblico</i> , 2nd ed.; French translation, <i>Nouveau droit international public</i> , by Charles Antoine, Paris, 1885. (Translated from French edition.)	Yes	"The sea, to a certain point from the coast forms a part of the territory of the State and is possessed by the Sovereignty which has the exclusive possession of it as against all other States. It is for this reason that it is called territorial sea; because the State has the juridical possession of it, which, as we have said above, it does not have of the high sea." (§ 801.)	"It remains now only to concern ourselves with the useful domain which pertains to the State, which has the right to profit from the products of its territorial waters and to prevent all other States from enjoying them." (§ 805.)
1882	MARTENS, F. de. Russian diplomat and publicist. <i>Völkerrecht. Das Internationale Recht der Civilisirten Nationen</i> , Vol. I, German edition by Carl Bergbohm, Berlin, 1883. (Translated from Bergbohm's edition.)	Yes	"By territorial waters one understands that part of the sea which immediately washes the shores of the coastal state. This part of the sea is recognized as the property of the state concerned, considered a continuation of its coastal land and stands under its sovereignty." (p. 378.)	

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1882	PERELS, Ferdinand Paul. German publicist. <i>Das internationale öffentliche Seerecht der Gegenwart</i> ; French translation, <i>Manuel de droit maritime international</i> , by F. Arendt, Paris, 1884. (Excerpts from Arendt's translation in Crocker, pp. 352-59.)	No	"The territorial sea, or maritime territory, is that part of the sea which extends from the coast a certain distance out. It is regarded as a national domain of the State whose coasts it washes. . . ." (p. 352.)	"No right of property, <i>dominium</i> , such as is ascribed to the State over the shore itself, is claimed over the territorial sea thus reserved." (Apparently refers to waters of sea without distinguishing them from bed and subsoil.) (p. 353.)
1883	NEGRIN, Ignacio de. Spanish publicist. <i>Tratado de Derecho Internacional Marítimo</i> , 2nd ed., Madrid. (Translated from 2nd edition.)	Yes	"Those above-mentioned waters [the littoral sea] . . . must be considered the maritime border of the state." (p. 63.)	"The littoral sea may be permanently owned and dominated." (p. 64.)
1884	FERGUSON, Jan. Hel- enus. Dutch diplomat. <i>Manual of International Law</i> , Vol. 1, London.		"Under the Jurisdiction of a State come also, besides the territorial properties above mentioned, the mouths and estuaries of rivers, the bays and a certain portion of the sea, called the <i>Territorial Waters</i> ." (p. 97.)	"Within the limits of their jurisdiction each State has the exclusive right of coast-fishery," etc. (Does not treat of bed or subsoil.) (p. 400.)
1884	TWISS, Sir Travers. English jurist and publicist. <i>The Law of Nations Considered as Independent Political Communities</i> , 2nd ed., Oxford.	Yes	"In the case of portions of the Sea, a Nation may have a peculiar possession of them, so as to exclude the universal or common use of them by other Nations." (p. 295.)	"Lord Stowell held that portions of the Sea might be prescribed for; and Mr. Justice Story deemed it possible that a Nation might have an exclusive use founded on the acquiescence or tacit consent of other Nations . . . the title is a matter to be established on the part of those claiming it, in the same manner as all other legal demands are to be substantiated by clear and competent evidence; in other words, by proof of ancient and constant usage." (p. 295-296.)



1885 PRADIER-FODERE, P. French publicist. <i>Traité de droit international public européen et américain</i> , Paris. (Translated from original edition.)	Yes	"The sovereignty and jurisdiction of the State does not stop, then, on the shore, but extends beyond, onto a part of the sea which washes it." (§ 619.)	"The right of the littoral State in the territorial sea is, then, a right of property." (§ 627.)
1886 TESTA, Carlos. Portuguese naval officer. <i>Le droit public international maritime</i> , translated from the Portuguese into French by Ad. Boutiron, Paris, 1886. (Translated from the French edition.)		"It results from this combination of circumstances that if a State does not have the right of property in the territorial waters, nevertheless it maintains there a right of domain or of jurisdiction which cannot be legitimately contested." (p. 72.)	He says waters cannot be owned to exclusion of innocent passage and common use, but apparently leaves bed and subsoil within general rule applicable to territory. (p. 72.)
1887 LEVI, Leone. English lawyer and teacher. <i>International Law with Materials for a Code of International Law</i> , London.	Yes	"Territorial sovereignty extends over both land and water within the territory, as well as over the natural increment of the land, as far as it can be defended from land." (p. 90.)	
1887 NUGER, A. French lawyer. <i>Des droits de l'état sur la mer territoriale</i> (thesis for the doctorate, Faculté de droit de Paris), Paris. (Translated from original edition.)		"Neither shall we adopt the system according to the State an <i>imperium</i> , absolute sovereignty in this sea, because according to our view the littoral State has, at the same time, both less and more than a true right of sovereignty." (p. 119.)	"Thus, it is more than a right of sovereignty. It is, indeed, difficult to explain, if one recognizes in the State only the <i>imperium</i> over the neighboring sea, the existence and the legitimacy of certain rights which, nevertheless, are unquestionably attributed to it, for example, the exclusive right of fishery for the enjoyment of its nationals." (p. 160.)



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			Sovereignty	Ownership
1889	IMBART de LATOUR, Joseph. French advocate. <i>La mer territoriale</i> , Paris. (Translated from original edition.)		"In the absence of special agreements, each State is the owner of its shores, and exercises its right of sovereignty over the territorial waters which surround it." (p. 19.)	"This portion of the sea is called territorial, and is considered fictitiously as a continuation of the continental territory." (p. 8.) Expresses opposition to this theory because of danger to common use and navigation. Otherwise recognizes exclusive rights to wealth of adjacent sea, such as corals off coast of Algeria. (p. 175.)
1891	LORD KYLLACHY, in <i>The Lord Advocate v. The Clyde Trustees</i> , 19 Rettie 174, 29 Scottish Law Rep. 153 (Court of Session).	Yes	"Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land, or is it only a protectorate for certain purposes, and particularly navigation and fishing? I am of the opinion that the former is the correct view." (Rettie, p. 177; Sc.L.R., p. 156.)	
1894	PEDELIEVRE, Robert. French publicist. <i>Précis de droit international public, ou droit des gens</i> , Paris. (Translated from original edition.)	Yes	"The State exercises its sovereignty over the full extent of a determined territory, within the limits of which it acts in all independence. . . . The surface of the national territory is composed of land and of water; from which we have the distinction between <i>terrestrial</i> territory and <i>fluvial</i> or <i>maritime</i> territory." (Vol. 1, p. 323.)	"This territory is the object of its right of property." (p. 323.) "One calls <i>territorial sea</i> the extent of the sea in which the State can, from the coast, make its power respected. This part of the sea is considered fictionally as a continuation of the continental territory. . . . This fiction is justified by several reasons." (Vol. 1, p. 335.)
1895	WALKER, Thomas A. English professor of international law. <i>A Manual of Public International Law</i> , Cambridge.	Yes	"By a consensus of writers, without one single authority to the contrary, some portion of the coast-waters of a country is considered for some purposes to belong to the country the coasts of which they wash. . . . This is established as solidly, as, by the very nature of the case, any proposition of international law can be." (p. 37.)	"Any definite area of the solid surface of the earth may by the adoption of a certain procedure become the sole property of a single people. . . . The methods of international territorial acquisition extend alike to land and water." (p. 26.)

1896 CALVO, Carlos. Argentinian publicist and diplomat. <i>Le droit international théorique et pratique</i> , 5th ed., Paris. (Translated from 5th edition.)	No	Does not recognize either complete sovereignty or ownership. "The States do not have in the territorial sea a right of property, but only a right of supervision ( <i>surveillance</i> ) and of jurisdiction in the interest of their own defense or the protection of their fiscal interests." (Vol. 1, p. 479.) (Apparently deals only with waters, not with bed or subsoil.)
1896 HEILBORN, Paul. German publicist. <i>Das System des Völkerrechts</i> , Berlin. (Translated from original edition.)	Yes	"The assumption of a real right [ <i>dinglichen Rechts</i> —at p. 53, he says that this is the property theory] to the coastal waters and accordingly also to the harbors and bays that lie to the landward of them seems therefore necessary." (p. 43.) "Hall points appropriately to the fact that the exclusive right of the littoral state to the acquisition of the products of the sea in the coastal waters must be derived only from a right to the coastal waters, not from an <i>imperium</i> ." (p. 41.)
1897 SCHUCKING, Walther Max Adrian. German publicist. <i>Das Küstenmeer in Internationalen Rechte</i> , Göttingen.		Recognizes sovereignty but does not deal with ownership of bed or subsoil.
1898 LAPRADELLE, A. Goeuffre de. French publicist. "Le droit de l'état sur la mer territoriale public," 5 <i>Revue de droit internationale public</i> , pp. 264-284, 309-347.	No	Says the State has "only a bundle of servitudes" but admits his system "has support neither in tradition nor in doctrine." "In denying that the territorial sea is a distinct sea, and in recognizing not sovereignty but simply coastal servitudes for the littoral State, we have unfortunately no authorities to invoke." (p. 347, translated at p. 236 by Crocker.)
1898 STOCKTON, C. H. A <i>Manual of International Law Based upon Lectures Delivered at the Naval War College by Freeman Snow</i> , 2nd ed., Washington. (Published by direction of the Navy Department.)	Yes	"As to marginal seas, a State can claim the narrow belt of water now universally conceded as territorial property, as a matter of necessity for the better security of its people on land and also for the enjoyment of its fisheries." (p. 15.)
1899 LORD WATSON, in <i>The Lord Advocate v. Wemyss</i> , [1900] A. C. 48 (House of Lords).	Yes	Said that within the territorial sea "the <i>solum</i> underlying the waters of the ocean, . . . and also the minerals beneath it, are vested in the Crown." (p. 66.)

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			Sovereignty	Ownership
1900	DAVIS, George B. American publicist. <i>The Elements of International Law</i> , New York and London.	Yes	"On this belt of coast sea, called the marine league, a state is acknowledged to have complete jurisdiction as against other states; whether its courts can assume jurisdiction over it or not will depend upon its municipal laws." (p. 55.)	"In accordance with the municipal law of most states . . . private ownership ceases at high-water mark; the ownership of . . . lands under the sea, so far as such lands are susceptible of being made the subject of proprietorship, being vested in the state which they adjoin." (Footnote, p. 57.)
1900	GOULD, John M. American publicist. <i>A Treatise on the Law of Nations</i> , 3rd ed.	Yes	"Maritime countries have claimed from the earliest times more or less extended dominion over these waters, and subjected them to the laws and regulations of the state; . . ." (pp. 3-4.)	"The dominion over the territorial seas, as they are called, may, therefore, include rights of jurisdiction, or of property, or both." (pp. 3-4.)
1901	GAREIS, Karl. German law teacher. <i>Institutionen des Völkerrechts</i> , 2nd ed., Giessen. (Translated from the 2nd edition.)	Yes	"To this territory of the state over which it exercises sovereignty belong the following: . . . the strip of sea which, in drawing the boundary of a state's sovereignty seaward, must fall to the sovereignty of a coastal state." (p. 72.)	"Within the territory of the state (inclusive of the seas belonging to the country) the state can recognize as its interests anything that it wishes, and can promote these interests with any means which it may deem appropriate." (p. 85.)
1901	TAYLOR, Hannis. American jurist. <i>A Treatise on International Public Law</i> , Chicago.	Yes	"The whole space over which a nation extends its government becomes the seat of its jurisdiction, and is called its territory. Vattel, <i>Droit des Gens</i> ." (p. 206.) "As incidents to such territorial possessions must be added a state's jurisdiction over its marginal waters when its territory abuts upon the sea." (p. 263.)	" . . . As to the right itself there can be neither cavil nor question, . . . (3) because without it no state can retain and protect the natural products of the sea for the exclusive benefit of its own citizens." (p. 293.)



1903	OLIVART, Marques de. Spanish publicist. <i>Tra- tado de Derecho Inter- nacional Público</i> , 4th ed., Madrid. (Translated from 4th edition.)	Yes	"... The jurisdiction of the state over its territorial sea is exclusive as it is over its land territory." (Vol. I, p. 204.)	"... Let us study the things over which an absolute right of posses- sion exists although conditioned by international law... The part of the sea near the coasts must be adjudicated to the state which owns those coasts." (Vol. I, p. 203.)
1904	HALL, William E. Eng- lish authority on inter- national law. <i>A Treatise on International Law</i> , 5th ed. by J. B. Atlay (retaining text of au- thor), Oxford.	Yes	"The territorial property of a state consists in the territory occupied by the state community and subjected to its sovereign, and it comprises the whole area... and, when such area abuts upon the sea, together with a certain margin of water." (p. 100.)	"In claiming its marginal seas as property a state is able to satisfy the condition of valid appropriation. ... Accordingly, on the assump- tion that any part of the sea is sus- ceptible of appropriation, no serious question can arise as to the exist- ence of property in marginal waters." (pp. 152-53.)
1904	WESTLAKE, John. Eng- lish publicist. <i>Interna- tional Law</i> , Cambridge.	Yes	"Occupation [by the littoral State] is presumed to a geographical extent presently to be considered. Within that extent the water and its bed are territorial, and the wealth of both is the property of the territorial sov- ereign." (p. 184.)	
1906	MOORE, John Bassett. American authority on international law. <i>A Di- gest of International Law</i> , Washington.	Yes	Quotes from Hall in stating the gen- eral principle: "The territorial property of a state consists in the territory occupied by the state com- munity and subjected to its sov- ereignty, and it comprises the whole area, whether of land or water... together with a certain margin of water." (Vol. I, p. 615.)	Quotes from Rivier in stating the general principle: "The principle that the littoral sea forms part of the territory is justified by the exigencies of the conservation and safety of the state, from the mil- itary, sanitary, and fiscal point of view, as well as from the point of view of industrial interests, espe- cially that of the fisheries." (Vol. I, p. 699.)
1908	PARKER, J., in <i>Lord Fitzhardinge v. Purcell</i> , 2 Ch. 139. (Sup. Ct. of Judicature, Chan. Div.).	Yes	"Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership. The bed of the sea, so far as it is vested in the Crown, and a fortiori the beds of tidal navigable rivers, can be granted by the Crown to the subject." (p. 166.)	



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1908	von ULLMANN, E. German publicist. <i>Völkerrecht</i> , Tübingen. (Translated from original edition.)	Yes	"The general recognition of the exclusive rights of the littoral state in the line just mentioned is in fact conceivable and justifiable only by simultaneous recognition of the exclusive sovereignty of the littoral state." (p. 290.)	"To the water territory of a state belongs also the coastal sea. . . . It is a question of assuring the interests of the shore inhabitants in the exclusive and undisturbed exploitation of the products of the sea." (p. 290.)
1911	FULTON, Thomas Wemyss, Scottish writer. <i>The Sovereignty of the Sea</i> , Edinburgh and London.	Yes	"It is now settled as indisputable, both by the usage of nations and the principles of international law, that the open ocean cannot be appropriated by any one Power. But it is also as firmly established that all states possess sovereign rights in those parts of the sea which wash their shores. . . ." (p. 537.)	". . . sedentary animals connected with the bottom, such as oysters, pearl-oysters, and coral, which are found in shallow water, as a rule, and usually near the coast, . . . are looked upon rather as belonging to the soil or bed of the sea than to the sea itself. This is recognised in municipal law, and international law also recognises in certain cases a claim to such fisheries when they extend along the soil under the sea beyond the ordinary territorial limit. . . . These pearl fisheries [of Ceylon] are very valuable, and have been treated from time immemorial by the successive rulers of the island as subjects of property and jurisdiction." (pp. 696-97.)
1912	HERSHEY, Amos S. American professor of international law. <i>The Essentials of International Public Law</i> , New York.	Yes	"A State's territory is that definite portion of the earth's surface which is subject to its sovereignty or imperium." (§ 159, p. 172.) "The territory of a State bordering on the open sea also includes the Territorial or Marginal Sea." (§ 191, p. 195.)	"The Land Domain of a State also includes all islands formed within its territorial waters, and the territorial subsoil beneath its land and water surface." (p. 173.)

1912 NYS, Ernest. Belgian law teacher. *Le droit international* (new edition), Brussels. (Translated from 1912 edition.)

"But here it is a matter, in reality, of maritime zones in which the State is able to execute all the orders which it chooses to give and where the right is by no means in contradiction with the fact. Consequently, it is perceived that the integral thesis of sovereignty is sustained." (Vol. 1, p. 558.)

He favors calling the rights of the State a limited sovereignty, although he does not deny a right of ownership. He does not discuss the bed or subsoil.

1913 von LISZT, Franz, German publicist. *Das Völkerrecht*, 9th revised ed., Berlin. (Translated from the 9th edition.)

No "The territorial waters are not sovereign territory; but the coastal state can exercise certain jurisdictional powers over it." (p. 87.)

"A simple consideration makes it clear that the territorial waters can not absolutely be considered the territory of the coastal State." (p. 87.) Does not discuss the bed or subsoil.

1913 RAESTAD, Arnold. Norwegian publicist. *La mer territoriale*, Paris. (Translated from the original edition.)

"From the historical point of view, the territorial sea does not result from an occupation of the sea, but from successive occupations of certain rights in the sea, later joined into a bundle which by general agreement is called sovereignty." (pp. 161-62.)

"While the individual or collective rights in regard to the land are transferred naturally by the existence of the legal institution which is called property: individual property, property of the provinces [communes] or of the State, the rights in regard to the sea are more often—with the exception of the interior parts, and according to certain systems, the part nearest to the shore—isolated; they are called right of fishing, right of wreck, right of navigation, at the most right of usufruct, but not right of property." (p. 150.) (Note that he recognizes right of usufruct. Does not discuss bed or subsoil.)

1914 STOCKTON, Charles H. Yes American publicist. *Outlines of International Law*, New York.

"Exclusive Jurisdiction over Its Own Territory.—It is an exclusive right of jurisdiction of a state, practically speaking, over all territory, things, and persons within its boundaries. . . . Hall defines in more detail the territorial property of a state to consist 'in the territory occupied by the state community and subjected to its sovereignty, and it comprises the whole area, whether of land or water, included within definite boundaries, . . . and when such area abuts upon the sea, together with a certain margin of water.' (Hall, 6th ed., Atlay, p. 101.)" (p. 112.)

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1916	LORD SHAW, in <i>Secretary of State for India v. Chellinani Rama Rao</i> , 43 L.R. (Ind. App.) 192; 39 Indian Law Reports, Madras Series (Jud. Com. of the Privy Council.)	Yes	"The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire. It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in principle." (43 L.R. (Ind. App.) at pp. 201-202, 39 I.L.R. at p. 628.)	
1916	PLANAS SUAREZ, Simon. Venezuelan jurist <i>Tatado de Derecho Internacional Público</i> , Madrid. (Translated from original edition.)	Yes	"That part of the ocean washing the coast of a state and upon which the state exercises its exclusive sovereignty, is called <i>littoral sea</i> forming an integral part of the territory of the state that has the legal possession of the said littoral sea." (Vol. I, p. 173.)	
1918	KOHLER, Josef. German publicist <i>Grundlagen des Völkerrechts</i> , Stuttgart. (Translated from the original edition.)	Yes	"Even after the ocean became free, territorial waters remained under the territorial sovereignty, as is self-explanatory; for the mutual effects of land on coast and of coast on land are so great, that full territorial sovereignty of the land would be inconceivable if it were cut off sharply at the coast." (p. 105.) "The freedom of the seas is valid for the ocean as a sea, not for the bottom of the sea. Here rights may develop, insofar as the utilization of the sea routes is not affected." (p. 105.)	
1920	FOULKE, Roland R. American lawyer. <i>A Treatise on International Law</i> , Philadelphia.		"The other [view] is that the absolute and exclusive jurisdiction extends to the edge of the maritime belt, that the waters within which are as much a part of the territory of the state as the land is . . . particularly in view of the fact that the width of the maritime belt is based upon the extent of effective control from the shore, a jurisdiction sustained by artillery, which is about as absolute as any which can be imagined. . . ." (Vol. I, pp. 378-79.)	
1920	MOYE, Marcel. French law publicist. <i>Le droit des gens moderne</i> , Paris. (Translated from original edition.)	No	"By virtue of all these reasons and other analogies, for a long time there has been conceded in the littoral State an important right of supervision [police] in the littoral sea. It is not that it becomes really the proprietor, but its powers are sometimes very extensive." (p. 260.) (Does not deal with the bed or subsoil.)	



1920 OPPENHEIM, Lassa Francis Lawrence. German-English publicist on international law. <i>International Law</i> , 3rd ed. by Ronald F. Roxburgh, London.	Yes	"Whereas it is nowadays universally recognized that the open sea cannot be State property, such part of the sea as makes the coast waters would, according to the opinion of these writers, actually be the State property of the littoral States, although foreign States have a right of innocent passage for their merchantmen through the coast waters. . . . The real facts of international life would seem to agree with [this] opinion." (Vol. I, p. 333.) "A special part of territory the territorial subsoil is not, although this is frequently asserted. But it is a universally recognised rule of the Law of Nations that the subsoil to an unbounded depth belongs to the State which owns the territory on the surface." (Vol. I, p. 312.)	
1922 FAUCHILLE, Paul. French publicist. <i>Traité de droit international public</i> (8th ed. of <i>Manuel de droit international public</i> by Henry Bonfils, rewritten and brought down to date), Paris. (Translated from the 1922 edition.)	Yes	"Accordingly, the littoral State is sovereign of the coastal sea as of the mainland; its sovereignty over the coastal sea is as an extension of its sovereignty over its territory; it is a portion of its domain." (Vol. 1, pt. 2, p. 140.)	"The bottom of the territorial sea is, as well as that of the high sea, a thing without master which is of itself susceptible of a distinct occupation." (Vol. 1, pt. 2, p. 204.) "The practice of States has always recognized that the littoral State of the territorial sea alone can proceed to occupy its bed and subsoil." (Vol. 1, pt. 2, p. 205.)
1923 CRUCHAGA TOCOR- NAL, Miguel. Chilean jurist. <i>Nociones de Derecho Internacional</i> , 3rd ed., Madrid. (Translated from 3rd edition.)	Yes	"The principles of freedom of the sea and of the right that all states have to navigate through it today are considered as unquestionable except for the right of national sovereignty of the state over its territorial and interior seas." (Vol. 1, p. 336.)	"The maritime belt that the state is able to defend from its coast constitutes a part of its own territory." (Vol. 1, pp. 328-29.)
1923 GEMMA, Scipione. Italian publicist on international law. <i>Appunti di diritto internazionale</i> , Bologna. (Translated from original edition.)	Yes	"It is admitted without discussion that the Nations have a power of exclusive 'imperium' over certain portions of the sea and particularly over the so-called territorial or coastal sea." (p. 185.)	"The limitations implied by the right of innocent passage of foreign vessels and by certain exemptions applicable to them in matters of civil and criminal local jurisdiction exercised by the coastal nations are not enough to consider the littoral sea as something different from the national territory" (p. 187.)



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1923	HATSCHEK, Julius. German law teacher. <i>Völkerrecht—Als System Rechtlich Bedeutsamer Staatsake</i> , Leipzig. (Translated from original edition.)	Yes	"Since the unity which constitutes the legal sub-stratum for territorial sovereignty is lacking in the case of the territorial waters, we will have to regard the legal relation of the coastal state to the territorial waters not as a territorial sovereignty, but as a diffusion of the power of the state which is extended <i>ipso jure</i> , that is, as a sum of actions in international law, which have only one limitation: they may not injure [ <i>verletzen</i> ,—infringe upon, violate] the communal use of the other states." (pp. 190-91.)	"This view [maintained by some, that no sovereign power exists in the coastal sea] runs counter to the fact that the coastal state may doubtless take produce out of the territorial waters, which goes far beyond the scope of security measures." (p. 190.) Says the floor of the open sea may be occupied: "The power of the state which seeks to expand its territory by the use of the bottom of the sea, collides, in principle, with the rights of no one." (pp. 208-09.)
1923-1924	HURST, Sir Cecil J. B. English publicist. "Whose Is the Bed of the Sea?" <i>Brit. Yearbook of Int'l Law</i> , 1923-24, pp. 34-43.	Yes	"Parliament by this legislation [Cornwall Submarine Mines Act, Aug. 2, 1857] has committed itself to the proposition that the bed of the [territorial] sea below low-water mark is vested in the Crown." (p. 34.) States that this proposition is also established by the weight of authority (p. 37).	
1923	LAWRENCE, Thomas Joseph. English publicist. <i>The Principles of International Law</i> , 7th revised ed. by Percy H. Winfield, Boston and London.	Yes	"International law regards states as political units possessed of proprietary rights over definite portions of the earth's surface." (p. 136.) Says the State's territory includes the territorial sea, p. 138.	

1924 FENWICK, Charles G. American professor of international law. <i>International Law</i> , New York and London.		"Within the limits of the marginal sea the jurisdiction of the state is, with but one exception [the right of innocent passage on the part of foreign ships], as exclusive as is its jurisdiction over the land itself." (p. 251.)	He says that international law is not concerned with property rights, and he does not express a view on rights of property in the marginal sea. But he observes that the Roman concept of sovereignty and ownership is still the basis of the territorial rights of states. See pp. 219-221.
1924 POTTER, Pitman B. American professor of international law. <i>The Freedom of the Sea in History, Law and Politics</i> , New York.		"The definition of the degree of authority enjoyed by the littoral state over its marginal belt is still more difficult. That authority is something less than the authority exercised over the landed domain of the nation." (p. 105.)	Does not discuss rights of property as such, but does say: "Restrictions amounting to exclusion may be imposed upon fishing; upon anchorage, and any other use of the sea-bottom; upon the taking of gems or sponges." (p. 106.)
1925 EDMUNDS, Sterling E. American professor of international law. <i>The Lawless Law of Nations</i> , Washington.	Yes	"[A State's territory] is thus made up of the three elements of land domain, fluvial or maritime domain [in which he includes the territorial sea, pp. 90-91] and aerial space. And since jurisdiction is coextensive with territory, at least in the Anglo-American view, the State is said to be supreme within this area." (p. 90.)	
1925 MOLLER, Axel. Danish publicist on international law. <i>International Law in Peace and War</i> , English translation by H. M. Pratt, London, 1931.		"Over its territorial waters the state exercises a sovereignty, which differs from sovereignty over land territory (and national waters) chiefly in the fact that <i>innocent passage</i> (passage inoffensif) through territorial waters cannot be prevented." (Pt. I, p. 149.)	Says that the State's right over its territory, both land and water, is not a right of property but a right of the nature of public law. (Pt. I, p. 148.) But he makes no distinction, in this respect, between its right in the land territory and its territorial waters.
1926 BONDE, Amédée. French advocate <i>Traité élémentaire de droit international public</i> , Paris. (Translated from original edition.)	No	"The riparian states exercise a sovereignty restricted to the necessity of assuring respect for their economic interests and the security of persons and property." (p. 130.)	Denies a right of property in the territorial sea because it is not susceptible of appropriation because such a right would interfere with navigation. (p. 148.) Does not deal with the sea-bed or subsoil.

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1926	LINDLEY, M. F. English barrister. <i>The Acquisition and Government of Backward Territory in International Law</i> , London.	Yes	"Some writers, including Ortolan and Calvo, while admitting the existence of the territorial sea, deny that it is capable of absolute dominion and property, and allow only the right of jurisdiction. Such an opinion, however, is exceptional, and does not accord with present practice or with history." (p. 63.)	
1926	VERDROSS, Alfred. Austrian professor of international law. <i>Die Verfassung der Völkerrechtsgemeinschaft</i> , Vienna and Berlin. (Translated from original edition.)	Yes	Says that principle of freedom of the seas "does not in any way remove the competence of the coastal state over the coastal sea, a right derived from the occupation right." (p. 202.)	"... the fundamental maxims of international law concerning the coastal sea are only applications of the generally valid principles of the original occupation right." (p. 205.) "To the coastal sea belong also the air column overhead and the bottom of the sea underneath the same." (p. 210.)
1926	von WALDKIRCH, E. Swiss publicist. <i>Das Völkerrecht in seinen Grundzügen dargestellt</i> , Basle. (Translated from original edition.)	Yes	"... It is this very rule which is decisive for the view that territorial waters are to be regarded as water territory of a state." (p. 109.) "The territory of the state ... involves not only the land and water surfaces, but also the interior of the earth and the air space over the defined part of the earth." (p. 105.)	
1927	JESSUP, Philip C. American jurist and teacher of international law. <i>The Law of Territorial Waters and Maritime Jurisdiction</i> , New York.	Yes	"Whatever rights, privileges, powers and immunities the law attaches to the owner, those are enjoyed by that nation which is sovereign of the object. In this sense it is believed that a State is sovereign over the territorial sea and over the air space." (pp. 116-117.)	
1928	PERGLER, Charles. American professor of government. <i>Judicial Interpretation of International Law in the United States</i> , New York.	Yes	Says the marginal sea is considered a part of the territory of the sovereign (see p. 105).	



1928	STRUPP, Karl. German publicist. <i>Grundzüge des positiven Völkerrechts</i> , 4th ed., Bonn. (Translated from original edition.)	Yes	Adopts theory of "a restricted power of the state over coastal waters in harmony with the actual circumstances," in preference to that of <i>unrestricted</i> territorial sovereignty." (p. 83.)	"That the riparian state has certain rights in the coastal waters is justified in my opinion on grounds of security . . . and also in economic reasons." (p. 83.) Recognizes that subsoil of the sea is capable of being property (see p. 101).
1929	KEITH, A. Berriedale. Ed. English barrister. <i>Wharton's Elements of International Law</i> , 6th Eng. ed., rewritten by Keith, London.	Yes	"That a State possesses sovereignty over, or internationally property in, its maritime belt is generally admitted, though it has been claimed that the power of the State is limited to control for certain purposes, e. g., neutrality, police, fishery, only." (Vol. I, p. 368.)	
1930	BUSTAMANTE y SIRVIN, Antonio Sanchez de. Cuban jurist. <i>La mer territoriale</i> , French translation from the Spanish, by Paul Goulé, Paris. (Translated from the French edition.)	Yes	Summarizes his views in a proposed international code: "The State exercises over its maritime territory all sorts of rights, without other limitations than those established in its internal laws, in its treaties in force, or in the provisions of the present code." (p. 158.)	"The maritime territory includes not only the waters mentioned . . . but their bed and subsoil and the aerial space above them." (p. 158.)
1930	SODERQUIST, Nils. Swedish publicist. <i>Droit international maritime suédois</i> , Paris. (Translated from original edition.)	Yes	"We are going to see soon that there is in Sweden an abundance of legislative acts including the coastal sea in the national territory. I have nevertheless thought it necessary to establish that this is a reasonable conception and one to which no State is opposed." (p. 61.)	The denomination of territorial sea is very appropriate to characterize this water. The noun <i>sea</i> describes it as a part of the larger region of maritime right, the adjective <i>territorial</i> brings out that it enters into the national domain by the same title as territory in general." (pp. 61-62.) This also includes the subsoil (p. 95).
1931	STOWELL, Ellery C. American teacher of international law. <i>International Law, a Restatement of Principles in Conformity with Actual Practice</i> , New York.		"The sovereign jurisdiction over these marginal seas is essentially the same as that exercised on land, namely, the right to make and enforce reasonable regulations to govern all those who enter the specified regions." (p. 57.)	Does not discuss right of property, as such, but inference is that the marginal sea is a part of the territory in the same manner as the land. See, e. g., footnote 4, p. 57.



Year	Authority	Recognizes Both Ownership and Sovereignty	References and Quotations	
			Sovereignty	Ownership
1932	FOIGNET, René. French law teacher. <i>Manuel élémentaire de droit international public</i> , 15th ed. revised by E. Dupont, Paris. (Translated from the 15th edition.)		"According to a third opinion which prevails today, the riparian state would have, in default of sovereignty, a power of police and of security which would permit it to take all convenient measures to shelter itself from the danger which might menace it from the sea side." (p. 284.)	Although he expresses a lack of full sovereignty over the territorial sea, he lists it as a part of the territory of the State. See p. 260.
1932-1934	GIDEL, Gilbert. French professor of international law. <i>Le droit international public de la mer</i> , Chateauroux. The most exhaustive treatise written on the subject. (Translated from original edition.)	Yes	"... The territorial sea forms a part of the territory and is subject to the sovereignty of the littoral State." (Vol. 3, p. 154.) He says the territorial sea is essentially a submerged part of the land territory. See Vol. 3, pp. 168-69.	"In our opinion, ... the rights of the littoral State in the subsoil of the territorial sea are rights which are associated with the status of the terrestrial sphere [ <i>milieu</i> ] and not that of the maritime sphere. The terrestrial territory of a State includes the subsoil covered by the territorial sea to its outer boundary." (Vol. 3, p. 331.)
1932	HOLD-FRENECK, Alexander. Austrian teacher of international law. <i>Lehrbuch des Völkerrechts</i> , Leipzig. (Translated from original edition.)	Yes	"The sovereign waters form territory of the littoral state, its territorial sovereignty extends to the inward waters and coastal sea." (Vol. 2, p. 62.)	
1933	BALDONI, Claudio. Italian publicist on international law. "Les navires de guerre dans les eaux territoriales étrangères," 65 <i>Recueil des cours, Académie de droit international</i> , pp. 185-303. (Translated from the French.)	Yes	"Indeed, the limits imposed by general international law on the activity of the littoral State in the territorial sea do not constitute an exclusive characteristic of this latter and cannot, as a consequence, impress on it a juridical nature other than that which is peculiar to the terrestrial territory." (p. 200.)	

1933 FEDOZZI, Prospero. Italian publicist on international law. <i>Introduzione al diritto internazionale e parte general</i> , 2nd ed., Padua. (Translated from 2nd edition.)	Yes	"The acceptance of the principle that establishes that the state exercises over its territorial waters the same right of sovereignty as over the land territory deprives the distinction among the various physical parts of those waters of all usefulness." (p. 386.)	"The principle of territoriality is applied always without question to the bed of the territorial waters and to the subsoil under such waters in relation with any form of utilization (fisheries, mineral deposits, submarine galleries under straits or maritime channels)." (pp. 409-410.)
1935 SMITH, H. A. English publicist on international law. <i>Great Britain and the Law of Nations</i> , London.	Yes	"... In the view of the British government the bed and subsoil of the sea within territorial waters have always been regarded as the property of the Crown and subject to the jurisdiction of Parliament." (Vol. II, p. 141.)	
1938 BINGHAM, Joseph Walter. American publicist on international law. <i>Report on the International Law of Pacific Coastal Fisheries</i> , Stanford.	Yes	"The open sea is susceptible of jurisdiction . . . and is susceptible of property also." Says that modern state practice concedes to a coastal state jurisdiction and property in fisheries and other sea resources in its coastal waters. (p. 47.)	
1938 FRANCOIS, J. P. A. Dutch diplomat and international law authority. "Règles générales du droit de la paix," 66 <i>Recueil des cours, Académie de droit international</i> , pp. 1-294. (Translated from the French.)	Yes	"It is almost universally admitted that the authority exercised by the State in the territorial waters is of the same character as that which it exercises in its terrestrial domain. This zone constitutes a part of the territory and, as such, is subject to the sovereignty of the littoral State." (p. 47.)	
1938 URSUA, Francisco A. Mexican jurist. <i>Derecho Internacional Público</i> , Mexico. (Translated from original edition.)	Yes	Says that some authors have claimed that territorial waters "neither can be the object of property nor therefore fall under identical jurisdiction as that exercised over territory," but he says that "This solution is unacceptable." (pp. 174-75.)	

Year	Authority	Recognizes Both Ownership and Sovereignty	References and Quotations	
			Sovereignty	Ownership
1940	IRELAND, Gordon. American law professor. "Marginal Seas around the States," 2 <i>Louisiana Law Rev.</i> 252, 436.	Yes	"In the United States . . . always the decision by executive, legislative or judicial authority, in court or other tribunal, has been consistent with a theory of original absolute ownership by the sovereign state." (pp. 267-68.)	
1942	BRIERLY, J. L. English professor of interna- tional law. <i>The Law of Nations</i> , 3rd ed., Oxford.	Yes	"The doctrine which finds most support in the practice of states is that territorial waters form part of the territory of a state as fully as does its land territory, except that there exists a right of 'innocent passage' through them for the ships of other states." (p. 143.)	
1943	TOMASEVICH, Josq, <i>In- ternational Agreements on Conservation of Ma- rine Resources</i> , Stan- ford.	Yes	"This line [separating the contiguous waters from the high seas] decides the extent of territorial waters in which the coastal state has rights of exclusive jurisdiction and exploitation of resources in and under the sea." (p. 21.)	
1944	LEONARD, L. Larry, <i>In- ternational Regulation of Fisheries</i> , Washington.	Yes	"Since a state exercises sovereign rights over its territorial waters, there is no doubt that the fisheries within these waters are subject to that state's exclusive regulation." (pp. 9-10.)	"... the fishery within the territorial waters has been recognized as the exclusive property of the littoral state." (p. 11.)
1944	SCELLE, Georges. French authority on in- ternational law. <i>Droit International public</i> , Paris. (Translated from original edition.)	Yes	His view is that "there is an indivisibility between the territorial sea and the high sea;" but he recognizes that: "From the point of view of positive law in force, it seems useless to rebel against the fact that the unanimity of governments and the great majority of the doctrine consider: 1st, that the territorial sea is a part of the territory; 2nd, that it constitutes a domain of the sovereign State. . . . There is an indivisibility between the territory properly speaking and the submarine zone covered by water: it is 'submerged territory' as the soil of the interior waters (ports) and the bed of the rivers or lakes." (p. 319.)	



1945 HYDE, Charles C. American international law publicist. <i>International Law</i> , 2nd ed., Boston. This is best American treatise.	Yes	"With the understanding that the marginal sea is a part of the territory of the adjacent State, the contrasting aspect of the high sea, even where contiguous to territorial waters, is accentuated. The latter belongs to no State and is, therefore, subject to the control of none. The former does belong to a State and is, accordingly, subject to a large measure of its control." (Vol. 1, p. 461.) "The territory of a State consists in part of the area, both land and water. . . . There may be even more—the subsoil appurtenant to a coast and extending therefrom into an area beneath the sea." (Vol. 1, p. 467.) "The subsoil appurtenant to the coast of a State and extending therefrom into an area beneath the high sea is doubtless susceptible to acquisition by that State." (Vol. 1, p. 468.)
1945 KELSEN, Hans. Vienne-American. World-wide authority on jurisprudence and international law. <i>General Theory of Law and State</i> , Cambridge.	Yes	"The territorial waters (the maritime belt) legally belong to the territory of the littoral States, but the latter are here, according to international law, subjected to certain restrictions." (Innocent passage, etc.) (p. 211.)
1946 BALLADORE PALLIERI, G. Italian professor of international law. <i>Diritto Internazionale Pubblico</i> , 4th ed., Milan. (Translated from 4th edition.)	Yes	"The right of sovereignty . . . includes not only a right similar to the right of ownership, governed by the domestic laws, but a right more complete than the proprietary rights." (p. 403.) "The subsoil of the high seas can be subject to the right of property and any state that has acquired sovereignty over a part of that subsoil can use it for any purpose whatever if this utilization does not hamper the free use of the sea on the part of other states." (p. 379.)
1946 BORCHARD, Edwin. American law professor and publicist. "Resources of the Continental Shelf," 40 <i>Am. Jour. of Int'l Law</i> , pp. 53-70.	Yes	"Here there is both <i>imperium</i> and <i>dominium</i> . . . . The soil and subsoil wealth within reach of the shore was uniformly claimed by the riparian state." (p. 59.)
1947 FLORIO, Franco. Italian jurist. <i>Il mare territoriale e la sua delimitazione</i> , Milan. Translated from original edition.)	Yes	"The final consequence of the absolute right of the State over its territorial sea is that the same ' <i>jus dominii</i> ' and ' <i>jus imperii</i> ' over it must be considered as extending to the bed and subsoil beneath the sea as well as to the space over it." (p. 38.)



Year	Authority	Recognizes Both Ownership and Sovereignty	References and Quotations	
			Sovereignty	Ownership
1947	ROSS, Alf. Danish authority on international law. <i>A Textbook of International Law</i> (translated from the Danish by the author), London, New York and Toronto.	Yes	"The <i>geographical territory</i> of a state is usually divided into three parts: the land territory, the territorial waters, and the national waters. To this may be added as accessories the air space over and the subsoil under the territory." (p. 139.)	
1947	STARKE, J. G. English barrister. <i>An Introduction to International Law</i> , London.	Yes	"The principle of sovereignty over the maritime belt thus developed contemporaneously and coextensively with the doctrine of the freedom of the seas." (p. 115.)	"As to the surface and sub-soil of the sea-bed of the maritime belt, these belong absolutely to the littoral State." (p. 120.)
1948	LAUTERPACHT, H. English. World-recognized authority on international law. <i>International Law</i> , by L. Oppenheim, 6th ed., edited by H. Lauterpacht, London, New York and Toronto.	Yes	"Many writers maintain that such sway is sovereignty, that the maritime belt is a part of the territory of the littoral State, and that the territorial supremacy of the latter extends over its coast waters. . . . The practice of States seems to agree with [this] view." (Vol. I, pp. 442-43.)	"Supporters of that view rightly maintain that the universally recognised fact of the exclusive right of the littoral State to appropriate the natural products of the sea in the coast waters, especially the use of the fishery therein, is consistent only with the territorial character of the maritime belt." (Vol. I, p. 143.) ". . . the subsoil beneath the territorial land and water is an appurtenance of such territory." (Vol. I, p. 577.)
1949	SCHWARZENBERGER, Georg. English professor of international law. <i>International Law</i> , 2nd ed., London.	Yes	"In principle, there is no difference between the rights exercised by a State over its land territory and the rights which it possesses within its maritime territory." (Vol. I, p. 149.)	

## UNRATIFIED TREATY OF 1844

**A Treaty of Annexation, Concluded between the United States of America and the Republic of Texas, at Washington, the 12th day of April, 1844.**

The people of Texas having, at the time of adopting their Constitution, expressed, by an almost unanimous vote, their desire to be incorporated into the Union of the United States, and being still desirous of the same with equal unanimity, in order to provide more effectually for their security and prosperity; and the United States, actuated solely by the desire to add to their own security and prosperity, and to meet the wishes of the Government and people of Texas, have determined to accomplish, by treaty, objects so important to their mutual and permanent welfare.

For that purpose, the President of the United States has given full powers to John C. Calhoun, Secretary of State of the said United States, and the President of the Republic of Texas has appointed, with like powers, Isaac Van Zandt and J. Pinckney Henderson, citizens of the said Republic; and the said plenipotentiaries, after exchanging their full powers, have agreed on and concluded the following articles:

### Article 1.

The Republic of Texas, acting in conformity with the wishes of the people and every department of its Government, cedes to the United States all its terri-

territories, to be held by them in full property and sovereignty; and to be annexed to the said United States as one of their Territories, subject to the same constitutional provisions with their other Territories. This cession includes all public lots and squares, vacant lands, mines, minerals, salt lakes and springs, public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and accoutrements, archives and public documents, public funds, debts, taxes and dues unpaid at the time of the exchange of the ratifications of this treaty.

## Article II.

The citizens of Texas shall be incorporated into the Union of the United States, maintained and protected in the free enjoyment of their liberty and property, and admitted, as soon as may be consistent with the principles of the Federal Constitution, to the enjoyment of all the rights, privileges, and immunities, of citizens of the United States.

## Article III.

All titles and claims to real estate, which are valid under the laws of Texas, shall be held to be so by the United States; and measures shall be adopted for the speedy adjudication of all unsettled claims to land, and patents shall be granted to those found to be valid.

## Article IV.

The Public lands hereby ceded shall be subject to the laws regulating the public lands in the other Ter-

ritories of the United States, as far as they may be applicable; subject, however, to such alterations and changes as Congress may from time to time think proper to make. It is understood between the parties, that, if in consequence of the mode in which lands have been surveyed in Texas, or from previous grants or locations, the sixteenth section cannot be applied to the purpose of education, Congress shall make equal provision by grant of land elsewhere. And it is also further understood, that, hereafter, the books, papers, and documents of the General Land Office of Texas shall be deposited and kept at such place in Texas as the Congress of the United States shall direct.

#### Article V.

The United States assume and agree to pay the public debts and liabilities of Texas, however created, for which the faith or credit of her Government may be bound at the time of the exchange of the ratifications of this treaty; which debts and liabilities are estimated not to exceed, in the whole, ten millions of dollars, to be ascertained and paid in the manner hereinafter stated.

The payment of the sum of three hundred and fifty thousand dollars shall be made at the Treasury of the United States, within ninety days after the exchange of the ratifications of this treaty, as follows: Two hundred and fifty thousand dollars to Frederick Dawson, of Baltimore, or his executors, on the delivery of that amount of ten per cent. bonds of Texas; one hundred thousand dollars, if so much



be required, in the redemption of the exchequer bills which may be in circulation at the time of the exchange of the ratifications of this treaty. For the payment of the remainder of the debt and liabilities of Texas, which, together with the amount already specified, shall not exceed ten millions of dollars, the public lands herein ceded, and the nett revenue from the same, are hereby pledged.

## Article VI.

In order to ascertain the full amount of the debts and liabilities herein assumed, and the legality and validity thereof, four commissioners shall be appointed by the President of the United States, by and with the advice and consent of the Senate, who shall meet at Washington, Texas, within the period of six months after the exchange of the ratifications of this treaty, and may continue in session not exceeding twelve months, unless the Congress of the United States should prolong the time. They shall take an oath for the faithful discharge of their duties, and that they are not directly or indirectly interested in said claims at the time, and will not be during their continuance in office; and the said oath shall be recorded with their proceedings. In case of the death, sickness or resignation of any of the commissioners, his or their place or places may be supplied by the appointment as aforesaid or by the President of the United States during the recess of the Senate. They, or a majority of them, shall be authorized, under such regulations as the Congress of the United States may prescribe, to hear, examine and decide on all

questions touching the legality and validity of said claims, and shall, when a claim is allowed, issue a certificate to the claimant, stating the amount, distinguishing principal from interest. The certificates so issued shall be numbered, and entry made of the number, the name of the person to whom issued, and the amount, in a book to be kept for that purpose. They shall transmit the records of their proceedings and the book in which the certificates are entered, with the vouchers and documents produced before them, relative to the claims allowed or rejected, to the Treasury Department of the United States, to be deposited therein, and the Secretary of the Treasury shall, as soon as practicable after the receipt of the same, ascertain the aggregate amount of the debts and liabilities allowed; and if the same, when added to the amount to be paid to Frederick Dawson and the sum which may be paid in the redemption of the Exchequer bills, shall not exceed the estimated sum of ten millions of dollars, he shall, on the presentation of a certificate of the commissioners, issue, at the option of the holder, a new certificate for the amount, distinguishing principal from interest, and payable to him or order, out of the nett proceeds of the public lands, hereby ceded, or stock, of the United States, for the amount allowed, including principal and interest, and bearing an interest of three per cent. per annum from the date thereof; which stock, in addition to being made payable out of the nett proceeds of the public lands hereby ceded, shall also be receivable in payment for the same. In case the amount of the debts and liabilities allowed, with the sums aforesaid to be paid to Frederick Dawson and

which may be paid in the redemption of the Exchequer bills, shall exceed the said sum of ten millions of dollars, the said Secretary, before issuing a new certificate, or stock, as the case may be, shall make in each case such proportionable and rateable reduction on its amount as to reduce the aggregate to the said sum of ten millions of dollars, and he shall have power to make all needful rules and regulations necessary to carry into effect the powers hereby vested in him.

### Article VII.

Until further provision shall be made, the laws of Texas as now existing shall remain in force, and all executive and judicial officers of Texas, except the the President, Vice-President and Heads of Departments, shall retain their offices, with all power and authority appertaining thereto, and the Courts of justice shall remain in all respects as now established and organized.

### Article VIII.

Immediately after the exchange of the ratifications of this treaty, the President of the United States, by and with the advice and consent of the Senate, shall appoint a commissioner who shall proceed to Texas, and receive the transfer of the territory thereof, and all the archives and public property and other things herein conveyed, in the name of the United States. He shall exercise all executive authority in said territory necessary to the proper execution of the laws, until otherwise provided.

Article IX.

The present treaty shall be ratified by the contracting parties and the ratifications exchanged at the City of Washington, in six months from the date hereof, or sooner if possible.

In witness whereof, we, the undersigned plenipotentiaries of the United States of America and of the Republic of Texas, have signed, by virtue of our powers, the present treaty of Annexation, and have hereunto affixed our seals respectively.

Done at Washington, the twelfth day of April, eighteen hundred and forty-four.

[Seal] J. C. Calhoun

[Seal] Isaac Van Zandt

[Seal] J. Pinckney Henderson



## ANNEXATION AGREEMENT

*Joint Resolution of the Congress of the United States, March 1, 1845, 28th Congress, 2nd Session. 5 U. S. Stat. 797.*

### **Joint Resolution for annexing Texas to the United States**

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new state, to be called the state of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in Convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the states of this Union.

2. And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First*—said state to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. *Second*—said state, when ad-

mitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said republic of Texas; and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said state may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. *Third*—New states, of convenient size, not exceeding four in number, in addition to said state of Texas, and having sufficient population, may hereafter, by the consent of said state, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution. And such states as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri compromise line, shall be admitted into the Union with or without slavery, as the people of each state asking admission may desire. And in such state or states as shall be formed out of said territory north of said Missouri compromise line, slavery, or involuntary servitude, (except for crime,) shall be prohibited.

3. And be it further resolved, That if the President of the United States shall in his judgment and

discretion deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then, Be it resolved, that a state, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing states, as soon as the terms and conditions of such admission, and the cession of the remaining Texan territory to the United States shall be agreed upon by the governments of Texas and the United States: And that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two Houses of Congress, as the President may direct.

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*Joint Resolution of the Congress of Texas, June 23, 1845. 2 Gammel's Laws of Texas 1225.*

**Joint Resolution Giving the consent of the existing Government to the Annexation of Texas to the United States.**

Whereas, the Government of the United States hath proposed the following terms, guarantees, and conditions, on which the people and Territory of the Republic of Texas may be erected into a new State,

to be called the State of Texas, and admitted as one of the States of the American Union, to wit: [Quoted here was all of the Joint Resolution of the Congress of the United States of March 1, 1845, except paragraph 3.] And whereas, by said terms, the consent of the existing government of Texas is required,—Therefore,

Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That the Government of Texas doth consent, that the People and territory of the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of Government, to be adopted by the People of said Republic, by Deputies in Convention assembled, in order that the same may be admitted as one of the States of the American Union; and said consent is given on the terms, guarantees, and conditions set forth in the Preamble to this Joint Resolution.

Sec. 2. Be it further resolved, That the Proclamation of the President of the Republic of Texas, bearing date May fifth, eighteen hundred and forty-five, and the election of Deputies to sit in Convention, at Austin, on the fourth day of July next, for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing Government of Texas.

Sec. 3. Be it further resolved, That the President of Texas is hereby requested immediately to furnish the Government of the United States, through their



accredited Minister near this Government, with a copy of this Joint Resolution; also to furnish the Convention to assemble at Austin on the fourth of July next, a copy of the same.—And the same shall take effect from and after its passage.

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*Ordinance of the Convention of Texas, July 4, 1845.  
2 Gammel's Laws of Texas 1228.*

### **An Ordinance.**

Whereas the Congress of the United States of America has passed resolutions providing for the annexation of Texas to that Union, which resolutions were approved by the President of the United States on the first day of March one thousand eight hundred and forty-five; and whereas the President of the United States has submitted to Texas the first and second sections of the said resolution, as the basis upon which Texas may be admitted as one of the States of the said Union; and whereas the existing government of the Republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows,

[Quoted here was all of the Joint Resolution of the Congress of the United States of March 1, 1845, except paragraph 3.]

Now, in order to manifest the assent of the people of this Republic as required in the above recited portions of the said resolutions; We the deputies of the people of Texas in convention assembled, in their

name and by their authority, do ordain and declare, that we assent to, and accept the proposals, conditions and guarantees contained in the first and second sections of the resolution of the Congress of the United States aforesaid.

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*Joint Resolution of the Congress of the United States, December 29, 1845, 1st Session. 9 U. S. Stat. 108.*

**Joint Resolution for the admission of the state of Texas into the Union.**

Whereas, the Congress of the United States, by a Joint Resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to the Republic of Texas, might be erected into a new state, to be called *The State of Texas*, with a republican form of government, to be adopted by the people of said republic, by deputies in Convention assembled, with the consent of the existing government, in order that the same might be admitted as one of the states of the Union; which consent of Congress was given upon certain conditions specified in the first and second sections of said Joint Resolution: And whereas, the people of the said Republic of Texas, by deputies in Convention assembled, with the consent of the existing government, did adopt a Constitution and erect a new state, with a republican form of government, and in the

name of the people of Texas, and by their authority, did ordain and declare, that they assented to and accepted the proposals, conditions, and guarantees contained in said first and second sections of said resolution: And whereas the said Constitution, with the proper evidence of its adoption by the people of the republic of Texas, has been transmitted to the President of the United States, and laid before Congress, in conformity to the provisions of said Joint Resolution:

Therefore

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever.

## Summary of Disputed Fact Conclusions Contained in Plaintiff's Brief

The following chart has been prepared to summarize some of Plaintiff's conclusions of fact and the nature of the controverting evidence that the defendant seeks an opportunity to develop through trial:

Fact Conclusions of Plaintiff in its brief:	Defendant's evidence will show:
pp. 23, 28—The purpose of retention by the State of "vacant and unappropriated lands" was to pay the debts of Texas, and residue of the lands to be disposed of as the State might direct.	The purpose of the reservation of "vacant and unappropriated lands" was to allow the State to retain all lands within its limits not expressly ceded. The State was to retain its lands and could use the proceeds from sale of lands or any other funds to pay its debts.
p. 28—The parties to the agreement had in mind salable lands.	The parties had in mind all the lands within the limits of Texas not expressly ceded. Much of the land in Texas was not then regarded as salable in the near future.
pp. 28, 33—"In 1845, however, lands under the sea were clearly not regarded as valuable or salable."	The land under the sea was known to be valuable in 1845 and the resources thereof were used by the people of Texas. Oil therein was known and put to valuable uses as were shell, sand and gravel and sedentary fish.
pp. 30, 28, 31—The phrase "vacant and unappropriated lands" "was considered the equivalent of 'public lands.'"	Although the land in controversy was included within either phrase, the United States Congress placed "vacant and unappropriated lands" in the final draft in lieu of the other phrase.
pp. 32, 47—"The Republic of Texas apparently did not include the marginal sea area in its public land system" and did not administer them as part of its public lands.	The Republic specifically provided that lands under navigable waters were not subject to sale. They were to be held in trust for the benefit of the people of Texas.
p. 34—"The State's attempt to include the Gulf lands in its public domain seems to be a relatively recent innovation."	The State and the Republic have always included Gulf lands within its public domain, and treated it as such.



**Fact Conclusions of Plaintiff  
in its brief:**

pp. 35, 43—The reservation of "vacant and unappropriated lands" "could not have been designed to include submerged lands in the Gulf."

pp. 35, 38, 66—The Annexation Agreement expressly required ports and harbors to be ceded to the United States.

p. 37—"Rights claimed by littoral nations in their marginal seas have from their inception been recognized as pertaining to their national defense."

pp. 38, 66—"It is reasonable to suggest that the territorial sea was ceded expressly as other property and means pertaining to the national defense."

pp. 38, 56, 59—"If the general phrase 'vacant and unappropriated lands' had been thought to include the marginal belt, the obvious objection, from the United States' point of view, would have been that such lands were essential to the United States in its conduct of national defense and foreign relations."

pp. 39, 66—"The boundary clause does more than merely reserve to the United States one specific matter involving foreign affairs."

**Defendant's evidence will show:**

The intention of the parties was to reserve to Texas all lands within its limits, including the submerged lands in the Gulf. Certainly the land was not ceded to the United States.

The Annexation Agreement required a cession to the United States of only those sections of ports and harbors used exclusively by the Texas Navy as part of defense installations.

The customs and usages of nations as well as records of international practice show that submerged lands in the marginal belt were subject to ownership and that such ownership was for beneficial use as well as defense, the latter being a governmental power severable from the former.

All property intended to be ceded for defense purposes was inventoried, titles examined, and official exchanges made. It did not include, and the parties did not intend for it to include, the lands and minerals in controversy.

No such objection was ever made. It was never thought that the ownership of submerged lands was essential, nor it is now essential to the conduct of national defense and foreign relations. No interference with these powers has occurred while the State administered the lands, and if it did occur, the interference could be prevented by court action or otherwise.

The sole purpose of including the boundary adjustment clause was to allow the United States to settle the boundary between Texas and Mexico, which was accomplished by the Treaty of Guadalupe Hidalgo.

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**Fact Conclusions of Plaintiff  
in its brief:**

pp. 44, 47, 54—"There is the gravest doubt, however, whether the Republic had, or ever asserted, any valid claim to ownership and there is also a serious question even as to the logically antecedent issue of jurisdiction."

pp. 45, 49—"Texas treaties clearly did not affirm jurisdiction over, or property rights in, the marginal sea."

p. 50—"The 1819 treaty fixed the boundary at the Gulph of Mexico, and not three miles or three leagues from shore."

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**Defendant's evidence will show:**

The Republic of Texas asserted ownership of the submerged lands within its limits and the customs and usages of nations, as well as records of international practice, show that submerged lands within the marginal belt were within the jurisdiction of the adjacent nation and were susceptible of ownership.

Texas' claim to the marginal sea was known to the major nations of the world and was acquiesced in at the time the treaties were concluded.

The 1819 treaty fixed the boundary "on the Gulf of Mexico, . . . in the sea." The declared purpose of the 1819 treaty, was to fix only a part and not the whole of this boundary line.

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In addition to the facts that have been noticed, plaintiff's brief contains a number of mixed conclusions of law and fact from which the defendant has been unable to separate the facts.

## The Mineral Estate in Texas Submerged Lands\*

Texas obtained its original system of mineral law from its predecessor Spanish and Mexican sources. Under this law the sovereign was the owner in place of the minerals in all lands within its boundaries, whether they be public, private, or common lands. This Spanish mineral law applied to Texas when it, as a part of Mexico, was under the dominion of Spain. That law remained in effect when Mexico achieved its independence from Spain in 1821 and when Texas won its independence from Mexico in 1836. The Texas Constitution of 1836 provided:

“All laws now in force in Texas and not inconsistent with this Constitution shall remain in full force until declared void, repealed, altered, or expire by their own limitations.”<sup>1</sup>

The Spanish-Mexican mineral concepts had become so fixed in the property law of Texas that they were specifically retained when the common law was otherwise adopted by the Republic of Texas in 1840. Its adoption of the common law in that year specifically provided that it did not apply to “such laws as relate to the reservation of islands, salt lakes, licks, and salt springs, mines and *minerals of every description* made by the general and State governments.”<sup>2</sup>

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\* Prepared in collaboration with Julius F. Franki, former Assistant to the United States Ambassador in Santiago, Chile, and authority on Spanish land titles.

<sup>1</sup> Gammel's Laws of Texas 1077.

<sup>2</sup> Laws, Republic of Texas, 7th Cong., 1840, 3, 4; 2 Gammel's Laws of Texas 177.

This separate ownership of mines and minerals was recognized by the United States in the draft of the original treaty for annexation of Texas which provided for cession of all its territories to the United States, "including vacant lands, mines, minerals," etc.<sup>3</sup> Mines and minerals were enumerated separately from lands. This treaty was defeated by the United States Senate. The counter-proposal made in the form of a Joint Resolution by the United States Congress provided that Texas retain its "vacant and unappropriated lands" and pay its own debts. It is highly significant that practically all of the many drafts of this counter-proposal contained a cession of "mines and minerals" along with forts, navy, customhouses, etc. They were again enumerated and considered separately from lands. However, the "mines and minerals" were stricken from the Resolution before final passage in the House, and their omission was specifically noted with apparent approval in the Senate.<sup>4</sup> Thus, the final Annexation Agreement, adopted by the Congress of the United States and later approved by Joint Resolution of the

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<sup>3</sup> 4 Miller, *Treaties and Other International Acts of the United States of America* (G.P.O., 1934) 697.

<sup>4</sup> These drafts are found in the Congressional Globe, 28th Cong., 2nd Sess., on the following pages: (1) p. 26, resolution by Mr. Ingersoll; (2) p. 65, resolution by Mr. Douglass; (3) p. 76, resolution by Mr. Tibbetts; (4) p. 85, amendment of Mr. Douglass; (5) p. 129, resolution by Mr. Brown; (6) p. 140, resolution by Mr. Burke. The wording "all mines, minerals, salt lakes and springs" included in Mr. Brown's original draft was eliminated in his substitute draft adopted on January 28, 1845. Congressional Globe, 28th Cong., 2d Sess. 193. This omission was specifically noted in the debate on the House Resolution in the Senate. Congressional Globe, 28th Cong., 2d Sess.



Congress of the Republic of Texas,<sup>5</sup> not only left to the State its vacant and unappropriated lands but also its separate estate in the mines and minerals.

As a part of the annexation procedure, Texas adopted a new Constitution which was approved by the United States Congress. It included these provisions:

"The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas . . . shall remain precisely in the situation which they were before the adoption of this Constitution."<sup>6</sup>

"All laws and parts of laws now in force in the Republic of Texas . . . shall continue and remain in force as the laws of this State. . . ."

So fixed was the law of sovereign ownership of the minerals in Texas that a constitutional provision was necessary in order to effect a release of minerals to the then private owners of the soil when such action was deemed advisable in 1866.<sup>8</sup> Similar releases were made in 1869 and 1876. As later held in *Cox v. Robison*, 105 Tex. 126, 150 S. W. 1149 (1912), these releases applied only to minerals in lands on which title to the surface had previously

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<sup>5</sup> United States Resolution, 5 Stat. 797 (1845); Texas Resolution, Laws, Republic of Texas, 9th Cong. Ex. Sess., 1845, 4; 2 Gammel's Laws of Texas 1201.

<sup>6</sup> Art. VII, Sec. 20, Constitution of 1845; 2 Gammel's Laws of Texas 1293-94.

<sup>7</sup> Art. XIII, Sec. 2, Constitution of 1845; 2 Gammel's Laws of Texas 1299.

<sup>8</sup> Art. VII, Sec. 39, Constitution of 1866; 5 Gammel's Laws of Texas 880.

passed from the sovereign. They were retrospective, not prospective, and did not amount to a union or merger of the mineral estate and the surface of the State's unsold lands.

### *History of Sovereign's Separate Mineral Estate*

"In Spain, as early as the eleventh century the regalian system appeared, when the *Fuero Viejo* of Castile left the subsoil from the surface and decreed that 'all the mines of gold, and of silver, and of lead, and of whatsoever other mineral in the dominions of the king, no one shall venture to work them without license from the king.'"<sup>9</sup> And in that monumental compilation of Spanish law which was made in 1263 and published in the reign of Alphonso XI known as the *Siete Partidas*, it is recognized that the mines and minerals were the property of the King. Law V, Title 15 of Partida 2, with reference to land grants provided:

"... and [the King shall have the disposal of] mines if there be any and although it be not mentioned in the grant, that the King retains to himself the things above mentioned . . ."<sup>10</sup>

Francisco Javier Gamboa, outstanding commentator of Spanish mining laws, referred to this Article in his commentaries on the Mining Ordinances by saying:

"The *Ley de Partida* vested ownership of the mines in the King; therefore, they were held not

<sup>9</sup> Richard C. Backus and Phanor J. Eder, *A Guide to the Law and Legal Literature of Colombia* (Washington, 1943), 71-72.

<sup>10</sup> Gregorio Lopez, ed., *Las Siete Partidas* (Valladolid, Diego Fernandez de Cordova, 1587), vol. 1, 50.

to pass in a grant although not excepted out of the grant. Even though included, the grant was valid only during the lifetime of the granting Sovereign and required confirmation by his successors."<sup>11</sup>

The patrimonial right of the crown to subsoil products was clearly expressed once more in the *Ordenamiento de Las Leyes de Alcaldía* of 1386; one year later followed the first tax resulting from mining legislation, established by John I in Briviescas. The decree contained the following words:

"All minerals of gold, silver, lead and any other metal whatsoever in our realm belong to us; therefore, no one shall presume to work them without our special license and command

..."<sup>12</sup>

Subsequent ordinances and the nature of the rights vested in the crown, both as to Spain and its colonial possessions in the Americas, are best described by Gamboa in his *Commentaries on the Mining Ordinances of Spain* (1761), translated in Rockwell's *Spanish and Mexican Law* (1851). Rockwell describes Señor Gamboa as "the paramount authority in all doubtful cases in mining affairs . . . regarded with the highest respect, and was and is still, constantly referred to in the courts of Mexico, and

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<sup>11</sup> Francisco Javier Gamboa, *Commentarios a las Ordenanzas de Mines* (Madrid, Joaquin Ibarra, 1761) 11-12.

<sup>12</sup> Laws 47 and 48, title 38 of the *Ordenamiento de Alcaldía* in *Novísima Recopilación de las Leyes de España* (Madrid, 1805) vol. 4, book 9, 336.

as is presumed, of the other new republics of America also, as a great authority on such subjects." Gamboa says:

"In Spain, under the law of the *Partida*, the *property* of the mines was so *vested* in the king that they were held not to pass in a grant of the land, although not excepted out of the grant; and even though included in it, the grant was valid, as to them, only during the life of the king who made it, and required confirmation by his successors . . . .

"Afterwards, by a law of Don Alphonso XI. in the *Ordenamiento Real*, copied in the collection of Castile, all mines of gold, silver or any other metal whatsoever, and the produce of the same, were declared to be the *property* of the crown, and no one was to presume to work them, except under some especial license or grant, previously obtained, or unless authorized by immemorial prescription.

"This rule was moderated by John I., and the law as established by him, permitted any person to dig or work mines, in his own land or inheritance, or with the permission of the proprietor, in that of any other individual . . .

"Philip II. acting under the authority of the council and chief accountants, and considering . . . that the above-mentioned law of John I., had not been enforced, and that there were various doubts and difficulties, not provided for by that or any other law; *vested the mines wheresoever situate, and whether in public or private ground, in the crown; revoking the*



former grants thereof, the parties interested under which were to receive a compensation, upon exhibiting their claims within the term of one year.

“The object of so vesting them, was not that the right of searching for them should be limited to the crown alone, but that it should be freely extended to all the people, generally in such manner that they should be at liberty, without any license from the crown or any other party, to try for mines in all places whatsoever, *whether the ground belonged to the crown or any other lord, to abbeys or municipal corporations, whether it were public or waste ground, or whether it were the inheritance or soil of a private person . . .*” (126-127.)

Gamboa's predecessor, Juan de Solorzano Periera, who was a member of the Council of the Indies and an equally outstanding jurist of his time, in his *Politica Indiana*,<sup>13</sup> Book VI, chapter 1, says:

“ \* \* metals and the mines or the deposits from which they are taken, are held to be what is called regalian property (regalias), which is to say *property belonging to the kings* and supreme heads of the Provinces where they are found, as their own, and incorporated by law and custom into their patrimony and Royal Crown, *whether such metals are found in public places or in lands and possessions of individual persons*; and grants made by the rulers themselves because of the very general terms in which they are drawn, are of no avail and are ineffective to privately acquire or obtain the

<sup>13</sup> Published originally in 1629; 2d edition, Antwerp, 1702.

mines which are discovered in them, unless this is especially contained and expressed in such grant, as is provided and declared in many provisions of the common law and of the Kingdom . . . .”

Such was the accepted status of sovereign ownership of the minerals when vast new sources of gold, silver, quicksilver, lead, and other deposits were discovered in Spain's American possessions. Even oil, tar, and pitch were known and being used for less valuable purposes. By the time Gamboa published his *Commentaries* in 1761, there was a great demand in Mexico for a new code of mining laws, and this demand resulted in a compilation by Mexican authorities of the mining ordinances of May 22, 1783, later promulgated by King Charles III, which remained in effect as the law of Mexico and Texas on this subject. This famous code contained the following provisions:

“OF THE ORIGINAL OWNERSHIP OF MINES: OF THE GRANTS TO INDIVIDUALS, AND THE DUTIES TO BE PAID BY THEM FOR THE SAME.

“Section I.

“The mines are the *property* of my Royal Crown, as well by their nature and origin, as by their re-union, declared by the fourth law of the thirteenth Title of the sixth Book of the new compilation [of Laws and Statutes].

“Section. II.

“*Without separating them from my Royal patrimony*, I grant them to my subjects in property and possession, in such manner that

they may sell, exchange (pass by will, either in the way of inheritance or legacy), or in any other manner, dispose of all their property in them, upon the terms on which they themselves possess it, and to persons legally capable of acquiring it." (Rockwell's *Spanish and Mexican Law*, 49.)

In Chapter 6, Section 22, it enumerated the minerals owned and made subject to exploration as

"... not only the mines of gold and silver, but also those of precious stones, copper, lead, tin, quicksilver, antimony, calmine, bismuth, rock salt and other stoney matter (fossils), be they ores or semi-minerals, *bitumen*, and *liquids* (*juices*) of the earth . . ." (Rockwell's *Spanish and Mexican Law*, 54-55.)

The term "dominio radical" used in the caption of the Mining Ordinances of 1783 and in other Spanish mining laws in describing the property of the sovereign in mineral substances, is a technical expression which has been variously translated as "original ownership," "ultimate ownership," and "basic ownership." The term was employed by the authors of the Ordinances to signify that the concessionaire of a mining right thereunder, although he might transfer his rights, did not become vested with the ownership of the minerals in place which were still owned by the Crown. This is explained by Joaquín Velázquez de León, the drafter of the Ordinances, in his *Notas a las Nuevas Ordenanzas de Minas*, at pages 24-26.<sup>14</sup>

<sup>14</sup> See also the commentary of José Linares, "Legislación de Minas," published in *El Derecho* (Mexico, 1869), Vol. II, 457, *et seq.*

Dr. Walter Howe has recently published a book, *The Mining Guild of New Spain and Its Tribunal General, 1770-1821* (Harvard University Press 1949), in which he describes the sovereign rights under the "famous mining ordinances of 1783" as follows:

"Under this code, the *ultimate ownership and title* to all mines remained with the crown, while the 'dominium utile,' or right to work mines, was conceded freely to individuals. This was a gradual development from earlier law and practice concerning the property in mine . . . . (2.)

" . . .

"*Ultimate ownership* of mineral deposits continued to rest with the crown, while the 'dominium utile' was conceded to individuals. This provision, carried over virtually without change into the Mining Code of the Mexican Republic, is of interest in giving precedent to the provision of Art. 27 of the Constitution of 1917 which declares the nation to be *ultimate owner* of all mineral deposits. (67.)

" . . . The fact that they were drawn up by persons familiar with conditions in the New World was of the utmost importance, and was undoubtedly the reason why they proved so successful in practice. It has already been mentioned that they were extended to all of South America and the Philippines and had an influence on the mining laws of the United States." (77.)

After the Treaty of Guadalupe Hidalgo in 1848, most of the territory out of which was to be created



the States of California, Arizona, New Mexico, Colorado, Wyoming, Utah, and Nevada had previous Spanish or Mexican grants in which the minerals were owned by the Mexican Government and ceded to the United States under the Treaty. In his comprehensive treatise on *American Law Relating to Mines and Mineral Lands* (1897, 1903, 1914), Curtis H. Lindley found it necessary to devote considerable space to the Mexican mineral law relating to these previous grants. Mr. Lindley says:

“Ownership of mines under Mexican law.— Under the laws in force in Mexico at the date of the treaty of Guadalupe Hidalgo, mines *whether in public or private property*, belonged to the supreme government. (199-200.)

“*No interest in the minerals of gold and silver passed by a grant from the government of the land in which they were contained, without express words designating them. Such grant only passed an interest in the soil distinct from that of the minerals . . . . .*

“*In other words, there was a severance of the title to the minerals from the title to the land.*

“This was substantially the law of the ceding country at the date of the ratification and exchange of the treaty.” (p. 200.)

Dr. Harlow S. Person, staff chief of the American experts whose research served as a basis of the international agreement between the United States

and Mexico settling the famous oil expropriation controversy, in his book *Mexican Oil* (1942) describes this ownership theory as:

"... the fundamental Spanish-Mexican law to which attention has been directed—the fundamental doctrine that the sovereign, and his successors after revolution, the people, had *dominium directum* over the resources lying beneath the lands, and that the *surface owner was but conditional possessor of property never completely separated from the royal patrimony* . . . (20.)

"The Constitution of 1917 restated in a fundamental charter the centuries-old Spanish-Mexican legal doctrine that the sovereign (the people) has *dominium directum* over all lands and what lies beneath them; . . . . (22.)

"The Constitution of 1917, as has been indicated, restated fundamental Mexican law and declared that the *legal ownership* of petroleum and hydrocarbons—solid, liquid or gaseous—is vested in the nation; . . . ." (39-40.)

Throughout his book, Dr. Person speaks of the interest in the minerals as *dominium directum* (direct ownership) originally in the crown and then in the state in trust for the people. He makes it clear that oil was included.

Lares, an outstanding authority on the Spanish law, in his *Lessons in Administrative Law*, said:

"Thus, according to this law of the rights of the crown [*regalia*], the property in the mines

and the property in the surface were entirely distinct; the property in the surface belonged to private ownership and gave rise to the right of indemnity if it was damaged; the other belonged to the ownership of the crown and was the object of privileges and concessions which became numerous, and frequently without indemnity to the owner of the surface . . . And this same principle was adopted by nearly all the nations, which in their laws and statutes declared as rights of the crown and as patrimony of the sovereigns the veins of precious metals *“wherever they might be found, whether out in public lands, or whether in privately owned estates or lands. Thus it was in Germany, Spain and Portugal.”*<sup>16</sup> (85.)

Fernando Vega, a member of the Mexican Academy of Jurisprudence and Legislation, wrote:

“ . . . this property [coal and petroleum deposits] did not belong to the owner of the subsoil. With respect to this code of laws, the great juris-consult Vallarta, said: ‘In Mexico mining property has always been separated from the surface property and never has the mineral vein passed with the acquisition of the land. (Votos Vol II p. 243). Señor Vallarta based his statement on the historical precedents of our country.’”<sup>17</sup>

Manuel Gonzales Ramírez, a leading Mexican attorney, further elaborating the principle of sover-

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<sup>16</sup> Teodocio Larès, *Lecciones de Derecho Administrativo* (Mexico City, 1852).

<sup>17</sup> Fernando Vega, *Diario de Jurisprudencia* (Mexico City, 1905), Vol. VI, 78-79.

eign ownership of the minerals and the separation of the subsurface from the surface estate recently said:

"In view of the economic importance which the products of the subsoil have manifested and the undeniable riches in this sphere which the subsoil of what was then New Spain constituted, the ancient Spanish Crown concerned itself with regulating the matter in a special way, so that three aspects, easy to perceive, predominate in the laws which were promulgated with respect to this: *the first concerns the fact that the Spanish laws took pains to separate the surface from the subsurface; the second aspect is that the basic ownership (dominio eminente) belonged to the King.* . . ."

One of the greatest authorities on this subject in the United States was Justice Stephen J. Field of the Supreme Court of the United States. While a member of the Supreme Court of California, which dealt often with the subject, he wrote the opinion in the case of *Moore v. Smaw* and *Fremont v. Flower*, 17 Cal. 199 (1861), completely in accord with the Mexican and Spanish precedents above cited. He held that after 1848 the United States became entitled to the separate ownership in the minerals held by Mexico under an early Spanish grant of land in the California territory. The case is hereinafter referred to.

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<sup>18</sup> Manuel Gonzáles Ramírez, *El Petróleo Mexicano* (Mexico City, 1941) 152-154. See also José María Ots-Capdequí, *Manual del Historia del Derecho Español en las Indias y del Derecho Propiamente Indiano* (Buenos Aires, 1945) 299.



*Texas Authorities*

There are several Texas cases directly in point on this question. They show that this State, under the Spanish Mineral Law, had both a separate and distinct ownership in the mineral estate under all lands within its borders and an easement to enter upon the lands to develop that which it owned in the subsoil. The first of these cases was *Cowan v. Hardeman*, 26 Tex. 217 (1862). There the Supreme Court of Texas, in separate opinions by Justices Moore and Wheeler, held that the State's reservation of minerals did not render void a patent to lands on which minerals were later discovered. Justice Moore said:

"The main question for our decision in this case depends upon the construction that must be placed upon the proviso in the fourth section of the act for the relief of James Erwin and others, passed June 3, 1837, which reads as follows: 'Provided, that no lands granted by this government shall be located on salt springs, gold or silver mines, copper or lead, or other minerals, or any island of the republic.'

"The object and purpose of the legislature was simply to reserve to the republic the islands and the salt springs, gold and silver mines, copper and lead and other minerals, as corporeal hereditaments out of the public domain; and thus, while the mineral resources of the country that were then known to exist or that might afterwards be developed were thereby secured to the government, no embarrassment was placed in the way of the citizen in ac-

quiring the fee in the quantum of land to which his certificate or scrip entitled him. . . .

"Nor does the *reservation of its minerals and corporeal hereditaments* out of granted lands create any unusual or novel estate. It is a doctrine as old as the common law that all royal mines, that is to say, those of gold or silver, throughout the kingdom, *belonged* to the sovereign; and it is said, that though the king grant lands in which mines are, and all mines in them, yet royal mines will not pass by so general a description. Plow. 336. And we think it is evident that the legislature intended to do nothing more in this statute than to secure by an express reservation the same right to all minerals, when it granted land that was by the common law impliedly reserved to the king as to royal mines. Nor can it be urged that this construction militates against the express words of the law, which forbids the location of land, and that thereby we must understand that something more was intended to have been reserved than the *corporeal hereditament of the minerals*; for it must be remembered that this character of hereditaments are real estate. It is said in Rockwell's Spanish and Mexican Law, 580, 'that a *property* may be acquired in mines which will be quite independent of the property in the lands in which they are situated. In this condition, the minerals, of whatever character they may be, will, of course, still form parts of the land itself, and will constitute land in strictly legal acceptance.'

Justice Wheeler, in his concurring opinion, said:

"In the case of *Delesdenier v. The State*, 7 Texas 102-3, the proviso of the act of January 3, 1837 (Hart. Dig. art. 1810), which has been

brought into discussion in this case, was considered by the court as the declaration of a general principle applicable to all grants by the state. *As such I think it was intended by the legislature; not as the adoption of a new principle in the law of the state, but as declaratory of the existing law.* As the object of the act was to discharge a debt contracted by the government, by the sale of scrip, which might be supposed to possess peculiar merits, and to operate, in so far as the holders of this scrip were concerned, a repeal of the laws creating reservations of islands, salt springs, etc., the proviso was introduced, out of abundant caution, to guard against the implication that such repeal was intended. *It was intended as declaratory of the existing law* in its application especially to the scrip for which they were providing.

“The legislation of the congress of the republic affords other evidences of the solicitude of the legislature to guard the interest of the state in her islands, salt springs and minerals. There is a similar instance of the insertion of a provision reserving the islands from private appropriation, in the joint resolution of the 10th of December, 1836 (Hart. Dig. art. 1779), authorizing the president to negotiate a loan, and providing for the issuing of land scrip for the purpose. And in the act of the 20th of January, 1840. (Hart. Dig. art. 127), ‘to adopt the common law,’ and ‘repeal certain Mexican laws,’ etc., the repealing section expressly excepts from its operation ‘such laws as relate to the reservation of islands, and also of salt lakes, licks and salt springs, mines and minerals of every description;’ manifesting a settled policy and purpose, on the part of the legislature, to protect the interest of the state in the enumerated objects, and to guard against their appropriation to the purposes of private speculation.”

In the case of *State v. Parker*, 61 Tex. 265 (1884), the Supreme Court of Texas had before it the claim of the State to a "salt lake notoriously known as El Sal del Rey" in Hidalgo County. The large lake was located on soil theretofore patented by the State in 1847, and in the intervening time the Texas Constitution of 1866 had released to the owners of the soil all mines and mineral substances. The Court recognized that salt under the bed of the lake was a mineral and had been reserved by operation of law when the grant was made, but gave effect to the release of 1866. In this connection the Court said: "Theretofore in making grants of land the state had reserved the mines and mineral substances." It described the reserved right as including "salt springs, gold or silver mines, copper or lead, or other minerals," referring to *Cowan v. Hardeman*, *supra*.

In *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149 (1912), the Supreme Court of Texas construed the effect of the 1866 and 1876 constitutional releases of minerals to the then owners of the soil as applying retrospectively and not prospectively. They had no effect on the existing separate mineral ownership of the State in unsold lands and minerals.

Acting Attorney General of Texas Robert A. John wrote an exhaustive opinion for Governor Joseph D. Sayers on every phase of this subject on February 8, 1901. Most of his conclusions have been confirmed by subsequent court decisions. In speaking of the constitutional mineral releases of 1866 and 1876, he said:

"These definitions show beyond question that the State in giving the release, meant only to quiet an existing claim or interest reserved to



the mines and minerals. It certainly did not intend to affect lands that were not at that time owned by private individuals, for the state was at that time the owner of all lands that had not been reduced to private ownership, and if the release was prospective, as well as retrospective, it operated as a release to the state, who was herself the owner of the mines and minerals, in all public lands. We therefore have the anomaly of the state granting a release to herself. . . . It is hardly possible to concede that they did not intend for the old Spanish law to remain in force, leaving it to the wisdom of future times, and to future legislation, the granting of a release to private owners of the minerals which the lands to be sold in the future, might contain. The policy of the Act intending to encourage the development of mines on lands then reduced to private ownership, stimulating the development of resources of that kind, is apparent.

"The release treated as retrospective was therefore wise, but it was certainly not intended to commit the state to the folly of granting to private owners the mines that might afterwards be discovered on lands then a part of the public domain. . . ."

In *Theisen v. Robison*, 117 Tex. 489, 8 S. W. 2d 646 (1928), the Supreme Court of Texas considered a mandamus requiring the Land Commissioner to issue relator a permit giving him the exclusive right to prospect for and develop the oil and gas upon and within certain University land in Crane County. The question was whether sale of a determinable mineral

estate in University lands was within the constitutional provision authorizing sale of *lands*. The Court said:

"One of the first acts of the Republic of Texas (Paschal's Dig., Art. 4402, 5th ed.) was upheld by the Supreme Court after being construed as *reserving to the Republic certain minerals in certain lands or the grant of the remaining estates in such lands*. Cowan v. Hardeman, 26 Tex. 217.

"The Constitution itself expressly recognized that the mineral estate was *capable of ownership and of sale separated from other estates in land*, when it provided that the state 'releases to the owner or owners of the soil all mines and minerals that may be on the same.' Sec. 7, Art. 14 Constitution." (650.)

A comprehensive book on this subject was written by Wallace Hawkins in 1947. Taking its name from the great salt lake of Hidalgo County, "El Sal del Rey," it was published by the Texas State Historical Association. The following quotations are revelant here:

"The Republic of Texas by reason of its successful revolution in 1836 might well have adopted the American legal system with respect to mines and minerals, but it did not follow this course. Neither did it formally re-enact the Spanish Mining Ordinance of 1783. Rather, by mere second-degree reference, it adopted this Spanish ordinance as the law of Texas. The ordinance was a Mexican law in force in Texas because Mexico, upon its independence, adopted

the ordinance as Mexican law. The Republic of Texas made it Texas law by its Constitution of 1836. . . ." (11-12.)

" . . . The common law adoption in 1840 specifically excepted the common law pertaining to minerals. . . ." (12.)

"Upon entering the Union in 1846, the State of Texas did not, as it could have done, adopt the American or common law system with respect to minerals; but, as had the Republic, the state adopted the Mexican system of mineral reservation, which was nothing more than the Spanish Mining Ordinance of 1783. Moreover, this adoption was by reference and not by a re-enactment of the Spanish ordinance. The Confederate state constitution of 1861 followed the same course." (13.)

"The minerals saved to the state included gold, silver, precious stones, copper, lead, tin, quicksilver, rock salt, fossils, ores or semi-minerals, and *juices of the earth*. While oil, gas, and sulphur were not mentioned by name, lawyers would find it difficult to maintain that *Licenciado Velasquez's* quaint list failed to include them." (14.)

"Within a few months of the one hundredth anniversary of this ordinance, Chief Justice Ignacio Luis Vallarta of the Supreme Court of Mexico, in the famous Milmo case, held that by the ordinance *minerals and surface ownership had been divorced and had become two distinct ownerships, each independent of the other. . . .*" (8.)

" . . . long after minerals were relinquished to the owners of the surface by constitutional provision, the Supreme Court of the state finally decided the mineral question involved in the con-

test between the Spanish grant to San Salvador del Tule and the Texas patent and legislative act confirming the title to El Sal del Rey (1916). The court adhered to the Spanish system of *dual ownership and title to the surface and minerals*, that *title* to minerals did not pass with the ordinary grant or patent. The state, which had inherited *ownership* of El Sal del Rey from the Mexican government, retained its *title* thereto notwithstanding Governor J. Pinkney Henderson's patent to Lewis and notwithstanding the act of the legislature confirming the title granted by that patent. (27-28.)

"The Spanish and Mexican system was so indelibly a part of the government of Texas that the patent and the act of confirmation were required to be construed in accordance with the Spanish and Mexican law and not under the principles of common law as had been done in California. *In short, title to the minerals and the salt in El Sal del Rey had passed to the owner of the surface only by virtue of the constitutional mineral relinquishment of 1866. . . .*" (28.)

"*In respect to the remaining land, the public domain, in both annexed and ceded areas, the legislative branches of the governments were free to reserve minerals or make such other provisions as public policy and welfare demanded.*" (60.)

### Supreme Court of the United States

In *United States v. Castillero*, 2 Black 17 (1862), the Supreme Court was called upon specifically to decide the nature of the title of a prospector who had discovered and denounced a mine in California prior



to the Mexican cession. If his interest was "land" within the meaning of an act of Congress providing for the settlement of "private land claims" to be recognized by the United States under the provisions of the Treaty of Guadalupe Hidalgo, then it was entitled to registration and validation. Otherwise, his exclusive right thereto would be lost. The case was exhaustively briefed and argued. The arguments of counsel and the majority and dissenting opinions of the Court cover 354 pages of the official reports.

The Court was unanimous in holding that under the Spanish Mining Ordinance of 1783, which remained in force in Mexico in 1848, the Crown and its successor, the Republic of Mexico, owned the minerals as a separate estate.

As to this, Mr. Justice Clifford, writing for the majority said:

*"Property in mines not discovered and registered according to law, whether the mine was on public or private lands, was vested, as has already appeared, exclusively in the Supreme Government, so that private persons could not acquire it or any interest in it in any other mode than that prescribed in the provisions of the mining ordinance. . . ." (169.)*

and later

*"Mines under Mexican laws, as before explained, whether situated in public or private lands, belongs to the Supremé Government, and private persons can only acquire a title in one not previously discovered and made individual property according to law, by conforming substantially to the conditions ordained in the pro-*

visions of the 4th article of the Mining Ordinance as herein previously recited. . . ." (190.)

We will not burden the Court with extensive quotations from this lengthy opinion. A more thoroughgoing examination of the sovereign right of Spain, Mexico, and Texas in undiscovered minerals wherever located could be found.

Without exception, every available authority on the subject concludes that the Spanish-Mexican-Texas mineral law vested in the sovereign a separate and distinct ownership of the mineral estate in all lands within the borders of the Republic.

### *The Mineral Estate Includes Oil*

The authorities uniformly concede that oil was included within the Spanish Mining Ordinances of 1783 and its subsequent application in Mexico, Texas, and South American Countries.

As heretofore pointed out, the ordinances were drawn up in Mexico after a demand arose there for a code more applicable to the problems of mining in "New Spain." They were the first Spanish ordinances which specifically described liquid substances as within "all the mines and minerals reserved to the Crown." Article 22, Title 6, listed the minerals as including "bitumes or juices of the earth."

According to Mexican history, oil, pitch, and tar were known and used long prior to 1783. The following account is contained in *Mexico's Oil* (1940), a publication issued by the Mexican Government:

"The superficial evidences pointing to the existence of petroleum in Mexico, especially in the

Gulf Coast region, were so important that they could not have been ignored by the Indians. The black '*chapopoteras*,' pools of viscous liquid, so abundant in Tuxpam and Panuco; the old and oxidized asphalt deposits; the veins of an easily worked substance that cover the Papantla area; the strange and ill-smelling bubbling of the waters in some springs; the abundance of salt and sulphur springs; and the appearance of dark films on the surface of rivers and lagoons, could not fail to be observed by the inhabitants of the region.

"These viscous and, above all, treacherous pools, were even given a special name which we have corrupted, forming with its roots the hybrid word '*chapopoteros*.' '*Chapopote*' is the petroleum that seeps to the surface of the soil flowing naturally through the outcroppings of two strata of impermeable rocks. It is a black, ill-smelling substance of repulsive appearance. When burned, it gives off large clouds of thick heavy smoke of a penetrating odor. To our refined modern sense of smell, which is so peculiar, this odor is disagreeable; but to the Aztec noses it was only one odor more. Therefore, it is not surprising that they should have chosen '*chapopote*,' for ritual purposes. The word '*chapopote*,' according to the Aztec scholar Cecilio Robelo, is a word composed of two elements: '*tzouctli*,' which means glue or gum, and '*popochtli*' meaning smoke or odor. Chapopote was burned as an incense before the Indian gods, while the priests officiated at their rites.

"During the three centuries of Spanish rule in Mexico, the use of petroleum was not more extensive. . . .

"A few years later, however, some of the Spaniards had already noted the existence of *chapopote*. In his narration, Andres de Tapia

says: 'In my towns, near the coast, in a certain part there exist fountains of molten tar which oozes out in the form of pitch only it has no smell and when it is heated it thickens and forms a substance which is good for calking and no shipworm gets through it as it is bitter.

"Clavijero, so truthful and exact, when referring to Lower California, called the California oil 'marine tar' which appears to indicate that it was used for calking purposes.

"The use of oil for medical purposes developed considerably during the period of Spanish rule.

"Near the time of the Independence, the Spanish Government seemed to have visualized what significance the oil might have in the future, since it enumerated it specially in the laws of the Indies (1783) among the bodies inalienable property in which was reserved to the Spanish Crown. The designation of the hydrocarbons is made in a charming phrase: 'bitumens or juices of the earth.'"<sup>19</sup>

José de Diego Fernández, a member of the Mexican Academy of Jurisprudence and Legislation, referring to coal and oil deposits, say "Both substances belonged to the crown at the time of the promulgation of the Mining Ordinances."<sup>20</sup> His colleague Miguel Mejía<sup>21</sup> concurs, saying:

"Therefore the rock coal mines and the petroleum mines were like all the others, the special

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<sup>19</sup> For additional historical material concerning early use of petroleum, see *Petroleum*, by William T. Brannt (Philadelphia, 1895) 2-6.

<sup>20</sup> José de Diego Fernández, *Diario de Jurisprudencia* (Mexico City, 1905), Vol. VI, 431.

<sup>21</sup> Miguel Mejía, *Diario de Jurisprudencia* (Mexico City, 1905) Vol. VI, 584.



subject of the mining ordinances and they were subject to the provisions thereof."

M. G. Villers<sup>22</sup> of Mexico writes:

"In the third period, upon promulgation of the Mining Ordinance of 1783 especially for New Spain, we find a principle which may be considered as the origin of Petroleum Legislation. That is article 22 of Title VI of the Ordinance which says: 'Likewise I grant permission to discover, solicit, register and denounce in the manner provided, not only gold and silver mines, but also mines for precious stones, copper, lead, tin, quicksilver, antimony, zinc, bismuth, rock salt, and any other fossils of whatever kind, whether perfect metals or half-minerals, *bitumen or juices of the earth*, hereby according the necessary means for the accomplishment, beneficial use and working of them.'

... Although the terminology bitumen and juices of the earth, was somewhat vague, it shows a positive purpose to initiate a course of legislation concerning the matter, the same as applied to mining." (116-117.)

Maximilian was the first ruler of Mexico to use the word "petroleum" in describing the "juices of the earth." On July 6, 1865, he decreed:

"Maximilian, Emperor of Mexico, considering that Article 22, Title 6 of the Mining Ordinances establishes no regulation for the working of substances other than precious metals,

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<sup>22</sup> M. G. Villers, *El Artículo 27 de la Constitución Mexicana de 1917* (Mexico City, 1926). See also Manuel Gonzáles Ramírez, *El petróleo Mexicano* (Mexico City, 1941) 161.

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and as it is now necessary to establish them because of the development taking place in these important branches, and having heard [the opinion of] our Councils of State and of our Ministers, We Decree:

"Art. 1. No person may exploit salt mines, fountains or wells and lakes of salt water, mines of coal, *bitumen*, *petroleum*, alum, kaolin, and precious stones without having obtained the prior express and formal concession thereto from the competent authorities and the approval of the Ministry of Development. . . ."

Defendant has an abundance of evidence in the form of letters, newspaper articles, and testimony showing that oil was known and had valuable uses in the area in controversy long prior to 1845. Oil was specifically mentioned and considered by the Texas Constitutional Convention of 1866 as being included within the mines and minerals released to owners of the soil. *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149 (1912); *El Sal del Rey*, 58-59.

Hawkins in *El Sal del Rey*,<sup>24</sup> says:

"The minerals saved to the state included gold, silver, precious stones, copper, lead, tin, quicksilver, rock salt, fossils, ores or semi-minerals, and *juices of the earth*. While oil, gas and sulphur were not mentioned by name, lawyers would find it difficult to maintain that *Licenciado Velasquez's* quaint list failed to include them."

<sup>23</sup> Secretaria de Industria, Comercio, y Trabajo, *Documentos Relacionados con la Legislación Petrolera Mexicana* (Mexico, Dirección de Talleres Gráficos de la Nación 1919) 31.

<sup>24</sup> Wallace Hawkins, *El Sal del Rey* (Texas State Historical Association, 1947) 15.

On February 1, 1901, Acting Attorney General of Texas Robert A. John, after reviewing all the Spanish-Mexican-Texas mineral reservations, concluded:

"In the reservation of minerals, as above discussed, includes in the general term 'mineral,' any substance which can be gotten from beneath the surface for purposes of profit, not limited to metallic substances; and, in other words, petroleum oil, coals and other deposits that come within that definition."

*The Separate Mineral Ownership Extends Beneath Rivers, Lagoons, and Other Territorial Waters*

As heretofore shown, the sovereign's separate mineral ownership extended to all minerals within the "realm," "borders," or "jurisdiction," whether in private, public, or common lands.

Rivers, ports, public roads, and the sea and its shores were said by the early Spanish law to be common or public. Gamboa says the crown's mineral ownership was in all lands "wheresoever situate" in the entire realm "whether in public or private ground." Solorzano says "where they are found," whether "in public places or in lands and possessions of individual persons." He specifically refers to "rivers and public waters."<sup>27</sup>

Lares also says "whenever they might be found, whether out in public lands, or whether privately owned estates or lands." Fonseca and Urrutia are in accord. They show that during colonial times there

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<sup>27</sup> Juan de Solorzano Pereira, *Politica Indiana* (1701), Book VI, Chap. XIII.



were a great number of salt lakes and salines throughout New Spain (Mexico) and that the principal ones were administered directly by the Crown, either through its officials or by means of special lease or concession arrangements with private individuals. Salt, as has been shown, was one of the minerals mentioned specifically in the Mining Ordinances of 1783 and previous laws. They also show that salt was taken from the lakes themselves, the basins and shores of the lakes, and the sea. They say:

"The miners at Guanajuato, Balanes and Real de los Catorce consume the major part of the salt on the coasts; but in times of scarcity they go to Peñol Blanco. (Peñol Blanco was one of the principal salt lakes administered by the Crown, which is 35 leagues northeast of San Luis Potosi.) The miners at other places use only ground salt (i. e., salt which is scraped off of the basin of the lakes in times of drought) which is better than *salt from the sea* for working their metals, although they generally use *sea salt* when the prices are lower." (Vol. IV, 30.)

The same authors (writing in 1845) say that the salines and salt lakes in the province of Nuevo Santander, which embraced a large portion of the territory then within the boundary of Texas, were originally operated by means of leases and concessions to private individuals and that subsequently they were taken over and directly administered by

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<sup>26</sup> Fonseca y Urrutia, *Historia General de Hacienda* (Mexico, 1845 and subsequent years), Vol. IV, 6-140.

Crown officials. Also, according to Fonseca and Urrutia, the first gold mines to which the sovereign laid claim as his patrimony were mines located in the sands and gravel of the rivers or placers.

The writings of T. Esquivel Obregón in *Apuntes para la Historia del Derecho en México* also show that the mineral estate extended under rivers and water-covered areas. He says:

“The unit of mining property according to the Ordinance of 1783 was one *square* or rectangle, each side being 200 Spanish varas. . . . In placers and water-covered areas [*rebosaderos*] and other irregular mineral-producing deposits, the location [*pertenencia*] was measured in the manner determined by the mining tribunal.”<sup>27</sup>

Likewise José Maria Ots Capdequí says:<sup>27a</sup>

“According to Solorzano and other authors he cited as authority, gold ‘which is taken, found or worked in the rivers or streams’ was regarded as regalian property.

“The question is so clearly settled by this royal decree [i. e., the decree of Feb. 5 1904] that we do not consider any other authority necessary.”

There seems to be no doubt that the sovereign mineral estate extended to things in the sea. According

<sup>27</sup> (Mexico City, 1941) Tomo III, Nueva España, 225-226.

<sup>27a</sup> “El Derecho de Propiedad en las Indias” as published in *Anuario de Historia del Derecho Español*, Vol. II, p. 53 (Madrid, 1925).

to Dr. Juan Sala in his work, *Sala Mexicano* (1845), which was a standard legal text in Mexico,

“The air and all that it includes, the sea with its shores and products, the term shore including all that portion which the sea covers at high tide, are common property by natural law, and they are unequivocally such to the Romans and the Spaniards. Notwithstanding this, and although individuals cannot take possession of them, the various uses made of the sea near the coasts make it susceptible of ownership as to that portion adjacent to the land. All nations fish and take therefrom shells, pearls, amber, etc. and this use of the sea coupled with the faculty they have to prohibit other nations from so doing, has converted the sea as to this portion thereof [i. e., the marginal sea] into property no different than the lands occupied by them. No one doubts that the taking of pearls in Bahren and Ceylon, are a species of property, says Vattel.

“In the same way as the littoral sea is the property of certain nations respectively, so are other things, which like the sea are common, which cannot become the property of a certain city or person. Such are the rivers, the ports and public roads which all the citizens make use of, and even foreigners . . .” (Vol. II, pp. 11-12.)

Pearls were an important item in the royal patrimony during Spanish colonial times. The prevailing view with respect to this matter is that of Solorzano. He says:

“But this opinion [that pearls and precious stones are not regalian property] is generally

rejected by the majority of the authorities [*Doctores*] who teach that under the term metals there is included all of these precious stones . . . and also that in reason that they should be incorporated into the crown, since they are equally difficult to find, and their value and importance to the public welfare is no less than that of metals. . . ."<sup>28</sup>

Elaborate laws were eventually placed into effect with respect to the taking of pearls from the sea, as is evidenced by Book IV, Title 25, laws 1 to 48 of the *Recopilación de Indias*. The effect of these laws was to establish pearls and pearl fisheries as the patrimony of the crown in the same manner as mines were so regarded, and to make provisions to insure the collection by Royal officials of the King's portion or "quinto."<sup>29</sup>

Capedequí also points out that ship-wrecked property was similarly regarded as belonging to the Crown, being additional evidence of the fact that the patrimony of the Spanish sovereigns was not confined to land areas but was coextensive with the entire realm, and reached out into the sea.<sup>30</sup>

In the Philippine Islands, which were also a part of the Spanish Colonial empire, the same laws are in force as prevailed throughout the Spanish Colonies in America. In the recent case of *W. H. Lawrence v. Garduño*, the Supreme Court of the Philippines de-

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<sup>28</sup> Solorzano, *Politica Indiana*, Bk. VI., Chap. IX.

<sup>29</sup> See also Fabian de Fonseca y Carlos de Urrutia, *Historia General de Hacienda* (Mexico, 1845), Vol. I, 20.

<sup>30</sup> José María Capedequí, "El Derecho de Propiedad en Indias," Tomo II, *Anuario de Historia del Derecho Español* (Madrid, 1925) 55, 57-58.



clared that under the old mining laws of the Philippines, inherited from Spain, and under its new laws which went into effect November 15, 1935,

“Mineral deposits whether found in or under public or private lands or beneath rivers, lakes, lagoons, gulfs, bays, and seas within the maritime jurisdiction of the Philippines belong to the State and their disposition, exploitation, development or utilization shall be at the discretion of the State.”

In Scotland, another civil law country, this rule of law was described in *Duchess of Sutherland v. Watson*, 6 Session Cases 199 (Court of Session of Scotland, 1868), where the opinion by Lord Neaves stated:

“Coming to the question that we have here at issue, I think, in the first place, that the *solum* or *fundus* of the deep sea—that is, not only the part between high-water and low-water mark, but the sea within such a line as may be reasonably drawn in connection with the shores—belongs in property to the Crown, and does so as a patrimonial right. That it does so belong to the Crown, at least within narrow limits near the shore, such as are here in question, is clear; and that would be clearly seen if a question were raised as to any minerals which might extend under the sea, and which might be worked outwards from the shore to a point under the deep sea. I think that that right is a patrimonial one. It is not a right held by the Crown in trust for the public. There are rights held by the public that are burdens upon it so far. There is the public right of navigation; and there may or

may not be rights of fishing in the public—rights to catch fish that float in the public *fundus* or *solum*. These may be public rights; but the right of property in the *solum* of the sea I consider to be a clear patrimonial right of the Crown. And that right may be granted to one of the lieges subject always to those rights of navigation of which I have spoken, and it may be constituted by explicit infeftment, so as to make it a feudal estate." *Id.* at 213.

Another Scottish opinion in *Lord Advocate v. Clyde Navigation Trustees*, 19. Session Cases 174 (Court of Session of Scotland, 1891), stated:

"Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land? Or is it only a protectorate for certain purposes, and particularly navigation and fishing?

I am of the opinion that the former is the correct view. . . . In each case it is of course a right largely qualified by public uses. In each case it is therefore to a large extent extra *commercium*; but none the less it is, in my opinion, a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property.

Such I consider is the result of all the best authorities—Scotch, English, and foreign. . . . It has been affirmed on many occasions by high judicial authorities both in Scotland and England. It has also received practical effect in various judgments with respect, inter alia, to minerals under the sea, mussel-beds and oyster-beds, *maritima incrementa*, and flotsam and jetsam—(*Smith v. Officers of State*, 8 D. 722;—*Gammell v. Lord Advocate*, 3 Macq. 419; *Duch-*

ess of Sutherland v. Watson, 6 Macph. 199; Gann v. Whitstable Fishers, 11 C. B., N. S. 337, 13 C. B., N. S. 353, 11 H. L. 192; The Queen v. Duke of Cornwall, see L. R., 2 Exch. Div. 156; 21 and 22 Vict. c. 109).” *Id.* at 177-178.

All precedents on the subject indicate that the sovereign's separate mineral ownership was coextensive with the state's boundaries, including inland and coastal waters of the marginal belt. For instance, under the same Spanish law by which Texas claims its inland water and marginal belt minerals, Chile has for nearly 100 years produced, or leased for production, the undersea coal deposits under the Pacific off the coast of Lota. Today, the oldest mine has 50 miles of tunnels from the upland into the producing veins as far as four miles from shore beneath Chile's marginal belt along the Pacific Ocean. (See cross section sketch opposite page \_\_\_\_ of this brief.) Other subterranean coal mines under Chile's marginal belt include the Schwager and Lirquen mines. Under the same law, Peru owns and operates or leases a coal mine beneath its territorial sea in the Pacific, and Venezuela, Peru, Argentina, and Mexico have wells producing oil from beneath their marginal belts on the Atlantic, Pacific, and Gulf of Mexico, as well as from beneath other territorial waters. There are 2,000 wells in Lake Maracaibo, Venezuela, the farthest well extending 11 miles out in the water.

In each instance the mineral ownership is held under the law inherited by Texas and Latin-American countries from Spain. It is described by Spanish and Mexican writers as a *dominium directum* and a *dominium strictum* which was vested in the sov-

ereign in place or while the minerals are in the ground, and does not depend in any way upon capture or reduction to physical possession. Its classification as *dominium* rather than *imperium* appears to be proper, because the use and disposition of the substance has no connection with the regulation and public uses of the waters or lands which overlie the mineral strata.

As shown in *Mines and Mining Laws of Latin America* (1892), Bull. No. 40 of the Bureau of the American Republics, the mining laws of the following Latin-American countries, which have their origin in the same Spanish Mineral Ordinance of 1783 and have the same nature of sovereign ownership, extend to minerals (including oil) under rivers, bays, the marginal belt of the adjacent sea, and other territorial waters: Argentina (9), Bolivia (19), Brazil (37), British Guiana (49-58), Chili (63, 66, 86), Columbia (92), Dutch Guiana (105, 112), Guatemala (131), Honduras (136), Mexico (187, 217), Nicaragua (232), Peru (258), Uruguay (276), and Venezuela (304). Mexico had a specific petroleum law relating to subsoil of the national lands, lagoons, etc. as early as 1901. *Mexican Oil* (1942) 36, *supra*.

In Texas the great salt lake, "El Sal del Rey," comprising about nine square miles, was the earliest reported case on sovereign ownership of minerals beneath waters. *State v. Parker, supra*; Hawkins, *El Sal Del Rey* (Texas Hist. Ass'n., 1947).

Upon a hearing of this case on the merits, the defendant will submit additional evidence in support of the foregoing facts and precedents, including maps



and technical data with respect thereto, and specifically showing their value, knowledge, and use by the Republic of Texas.

○ Texas has continuously asserted title to the minerals under its submerged lands. Since 1917 there have been laws authorizing mineral leases on river beds and channels. Since 1919, mineral leases have been authorized on all "salt water lakes, bays, inlets, marshes, reefs . . . and that portion of the Gulf of Mexico within the jurisdiction of Texas."<sup>31</sup> The maintenance of its separate mineral estate in these lands is best evidenced by the Legislature's wording of the present Act in 1939:

"The mineral estate in river beds and channels and in all areas within tidewater limits, including islands, lakes, bays, and the bed of the sea, belonging to the State of Texas, are hereby set apart and dedicated to the permanent school fund."<sup>32</sup>

*The Separate Mineral Estate Did Not Pass to the United States*

As heretofore mentioned and hereinafter shown, the separate mineral ownership by the Republic of Texas was known to, and considered by, the United States Congress. The provision for cession of the mines and minerals was stricken from the draft of the Annexation Resolution. They were not ceded by

<sup>31</sup> 19 *Gammel's Laws of Texas*, 51 S. B. 56, Chap. 19, 2nd called session, 36th Leg.

<sup>32</sup> Art. 5421c-3, Sec. 2, *Vernon's Annotated Texas Civil Statutes*.

any other clause in the Resolution, and were intended to be reserved to the State of Texas, as evidenced by their omission from the cession, and by the reservation of "vacant and unappropriated lands lying within its limits." Although separate from the ownership of the soil, a general reservation of "lands" includes separate mineral estates. *United States v. Castillero*, 2 Black. 17.<sup>33</sup>

Under the mineral laws of Texas, the separate mineral estate did not pass except by specific grant. It did not pass by the transfer of national sovereignty to the United States. *United States v. Castillero*, supra; *Moore v. Smaw* and *Fremont v. Flower*, 17 Cal. 199 (1861). In the latter opinion by Mr. Justice Field, then a member of the Supreme Court of California, it was said,

"Such ownership stands in no different relation to the sovereignty of a State than that of any other property which is the subject of barter and sale. Sovereignty is a term used to express the supreme political authority of an independent State, or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority. . . . The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals, without affecting in any respect the po-

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<sup>33</sup> See also authorities argued under Point II D. 1b (3) of the brief.

litical jurisdiction of the State. They may be acquired by the State, as any other property may be, but *when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty.*" (218-219.)

It therefore follows that regardless of who may have or not have technical ownership of the bed of the sea or the waters of the Gulf of Mexico within the original boundaries of Texas, the State's Public School Fund nevertheless owns the mineral estate therein and thereunder.